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No. 06-

IN THE

Supreme Court of the United States

BONNIE WITTENBURG,

Petitioner,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in responding to a summary judgment motion an employment discrimination plaintiff actually must prove pretext by a preponderance of the evidence in order to receive a trial, or must a plaintiff simply produce evidence from which a reasonable juror could infer pretext in order to survive summary judgment?

2. Whether in responding to a summary judgment motion an employment discrimination plaintiff necessarily must establish a causal connection between discriminatory statements made by the employer and the adverse employment action at issue in order for those statements to be considered relevant evidence of discrimination?

3. Whether a trial court ruling upon a summary judgment motion in an employment discrimination case simply can view and dispose of each piece of evidence individually and in isolation, or must a court base its decision upon the totality of the evidence under the *McDonnell Douglas* burden-shifting framework?

4. Whether a court is permitted to draw an inference of age discrimination when a terminated plaintiff has duties assumed by a person within the protected class who is six years younger?

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CITATIONS TO OPINIONS

The September 28, 2006 opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Wittenburg v. American Express Financial Advisors, Inc.*, 464 F.3d 831 (8th Cir. 2006). The Eighth Circuit affirmed the decision of the United States District Court for the District of Minnesota unofficially reported at *Wittenburg v. American Express Financial Advisors, Inc.*, No. 04-922, 2005 WL 3047785 (D. Minn. Sept. 19, 2005).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). On September 28, 2006, the Eighth Circuit affirmed a District Court order granting the motion for summary judgment of Respondent American Express Financial Advisors, Inc. ("AEFA") and dismissed with prejudice the Amended Complaint of Petitioner Bonnie Wittenburg ("Wittenburg"). *See* Appendix ("App.") A. Wittenburg timely filed a petition for rehearing requesting rehearing and/or rehearing *en banc*. That petition was denied by the Eighth Circuit on November 16, 2006. *See* App. C.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Wittenburg maintains that the Court of Appeals erred in dismissing pursuant to a motion for summary judgment under Federal Rule of Civil Procedure 56 her claims for age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), and for gender discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII").

STATEMENT OF THE CASE

Wittenburg was hired by AEFA in 1998 as a stock analyst to work in the Technology Sector of the Equity Investment Department ("Department" or "EID"). At the time, she became only the second female analyst in a Department of 26 analysts. Wittenburg's performance was outstanding. According to her supervisors, Wittenburg worked hard, displayed "excellent

investment skills," and provided "first class service" to the investment portfolio managers whom she serviced. In 2000, Wittenburg was named "Analyst of the Year."

In the Fall of 2001, AEFA hired a new Chief Investment Officer to oversee the EID, Ted Truscott. Truscott was 40 years old. In turn, Truscott promoted an analyst named Tom Mahowald, 37, to Director of Research. In this capacity, Mahowald supervised all of the analysts including Wittenburg.

In early 2002, Truscott and his new management team initiated "a two year make-over plan" to reorganize the EID that included three reductions-in-force. The first occurred in February 2002 and resulted in the termination of several portfolio managers. The second, in June 2002, resulted in the termination of three analysts. The third and final reduction-in-force occurred in November 2003 and resulted in the termination of seven analysts including Wittenburg. Wittenburg maintains that the AEFA make-over plan unfairly targeted older employees like herself and favored younger individuals, that Mahowald was biased in favor of younger males and evaluated her performance in a discriminatory fashion, and that AEFA's reliance on Mahowald's discriminatory evaluation to justify her termination was a pretext for discrimination.

As part of the make-over, AEFA terminated 6 of the 8 oldest analysts in the EID, including Roger Lund, 61, Lawrence O'Connell, 61, Dan Donovan, 58, Thomas Medcalf, 56, Raymond Hirsch, 55, and Wittenburg, 51. Analysts Curtiss Weaver, 58, and Michael Garbish, 51, resigned their positions. Thus, the make-over resulted in the removal of the 8 oldest analysts in the Department.

Statements by Truscott and other AEFA leaders reflected a managerial attitude favoring younger employees. In February 2002, immediately prior to the first force reduction, Truscott stated that "we are not averse to hiring *younger* portfolio managers and analysts and growing them." (Emphasis added). Within days of that statement, Truscott, Human Resources Representative Judy Forker ("Forker"), and Head of Equities

Dan Rivera ("Rivera"), met with Alfred Henderson ("Henderson"), a 62 year-old portfolio manager, and informed him that he was being terminated. Later that day, Rivera explained to Henderson that his discharge was "part of a decision to retain those that were *younger* as *younger* employees have more years of service ahead of them."[1] (Emphasis added).

In preparation for the second reduction-in-force, Mahowald and Rivera created a chart of the 26 EID analysts, whom they rated as "keep," "maybe keep," "maybe," "maybe drop," or "drop." The three women including Wittenburg were rated as "maybe drop," the only analysts to receive this designation. Mahowald and Rivera rated as "keep" five younger male analysts whose overall performance ratings were in fact lower than or the same as Wittenburg's. Those analysts with lower scores were 26, 27, 32, and 38 years old. The fifth, 41, had the same overall rating as Wittenburg.

About that same time, Forker indicated that management wanted to add an analyst to the EID, namely, a "*jr. person*," as part of the reorganization. Within weeks of the second reduction in which three analysts were fired, including Larry O'Connell, 61, and Raymond Hirsch, 55, Mahowald hired Blair Brumley, 39, despite reports about his poor performance in the industry and lack of knowledge. Subsequently, Mahowald justified his decision because Brumley had been unemployed for 10 months and had a family to support. This was not the first or last time that Mahowald expressed support for younger male "breadwinners." In 1999, while still an analyst, he had a discussion with a female analyst named Kay Doremus who raised concerns that she was going to be fired by AEFA. Mahowald responded that she had to "make concessions" because "a lot of these guys [male analysts] are the sole support for their families."

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[1] Henderson filed a charge of age discrimination against AEFA with the Equal Employment Opportunity Commission that eventually led to a settlement agreement between the parties.

In 2002, Wittenburg continued to provide excellent service to the portfolio managers. In September, Mahowald described her stock performance ratings to date as "very, very good." In the Fall of 2002, Mahowald told all the analysts that their "number one priority" for the remainder of the year was to evaluate unrated stocks. Wittenburg was the only analyst to complete this assignment.

In February 2003, Mahowald met with Wittenburg to discuss her 2002 performance evaluation.[2] This was the first time that Mahowald had evaluated her. Shortly after his promotion to Director of Research, Mahowald had circled the word "integrity" on a corporate memo describing the performance evaluation process and wrote, "what bullsh-t." To Wittenburg's surprise, Mahowald gave her a G/4 rating for 2002 stock analysis and an L/3 score for her leadership. When Wittenburg told Mahowald that she did not agree with the G/4 rating, Mahowald told her that her written evaluation was not yet complete and that he would provide it "in the near future," but he never did.

Throughout 2003, Wittenburg protested the G/4 rating to Mahowald. In June, AEFA provided Wittenburg with a rating of her 2002 stock evaluation performance from an outside consultant to AEFA known as Starmine Monitor ("Starmine"). Starmine gave Wittenburg's 2002 performance four out of five stars, a high rating equivalent to a G/2.[3] When Wittenburg

[2] At AEFA, analysts like Wittenburg are evaluated in two broad and equally weighed categories. The first category, known as a Goal or "G" score, rates the employee's stock evaluation performance over the course of a year. The second category, known as an "L" score, rates the employee's "leadership" performance. AEFA concedes the "L" score is highly subjective. For "G" and "L" scores, analysts are scored on a scale of 1 to 5, with 1 being the highest rating. A "3" rating, which is the most common, means "achieved expectations in all areas," while a "4" means "achieved expectations in many, but not all areas," and is considered unsatisfactory.

[3] AEFA provided Starmine the same data it had considered to arrive at Wittenburg's G/4 rating.

learned of the Starmine score, she told Mahowald, "here is more indication that the G/4 doesn't make sense." Mahowald *agreed* with her, but nevertheless failed to change the G/4 rating to accurately reflect her performance. In September 2003, Wittenburg again protested her G/4 rating to Mahowald. He told her not to worry about the G/4, that her numbers in 2003 were "very good," and that everyone was "happy" with her performance.

At this time, Truscott and his management team prepared for the third and final reduction-in-force. Contrary to prior practice, they decided to eliminate analysts by sector as opposed to picking from the entire pool. AEFA claimed it wanted to retain analysts based on their specific areas of expertise. Also contrary to prior practice, Truscott and his management team chose to eliminate analysts based on their performance not over a number of years but rather as rated in a single year, namely, 2002. This about-face was contrary to a recent memo from Truscott who had stressed the importance of measuring performance over a number of years.

Truscott and Mahowald decided to eliminate 3 out of the 4 analyst positions in the Technology Sector. Upon learning of the upcoming reduction-in-force, portfolio manager Mike Kennedy specifically requested that management keep Wittenburg because she had done a good job for him. AEFA claims that it compared the 2002 performance ratings of all 4 analysts in the Technology Sector and decided to terminate Wittenburg because her G/4 and L/3 scores were not the best in the group.

On November 18, 2003, Truscott informed Wittenburg that she had been terminated. Wittenburg vehemently disputed the accuracy of the G/4 score and insisted that her performance justified a much better rating. In response, Truscott mentioned the analysts' failure to evaluate the unrated stocks assigned to them, Mahowald's so-called "number one priority." Wittenburg, however, was the only analyst in the EID to complete that assignment. Immediately following Wittenburg's termination

meeting, Mahowald went to see Wittenburg in her office. During that brief encounter, Mahowald stated, "Your husband has a job, doesn't he?"

AEFA kept a younger male analyst in the Technology Sector, Dean Ramos, 40. For his performance in 2002, Mahowald had rated Ramos a satisfactory G/3 for stock evaluation and a very high L/1 for leadership. Undisclosed to Wittenburg was the fact that Mahowald had handed out higher "L/1" ratings to two younger male analysts in the Technology Sector, namely, Ramos and Kurt Lauber, 35. Mahowald later claimed that he had awarded Ramos and Lauber higher L ratings because the two had completed certain "special projects" assigned to them. Mahowald never assigned or offered to assign any "special projects" to Wittenburg. Unlike Wittenburg, neither Ramos nor Lauber had completed Mahowald's "number one priority" of evaluating unrated stocks, yet she received no credit for this accomplishment in her evaluation scores, and the two men received no demerit in theirs.

Following Wittenburg's termination, AEFA assigned her duties to Ramos, 40, and a younger male Industrial Sector analyst named Steve Roorda. (Roorda "[w]ill work closely with Dean Ramos on other technology-related coverage"). Roorda was 45 years old. AEFA also advertised for two new analyst positions in its Minneapolis office. In contrast to its stated preference for specific Sector expertise in justifying the November 2003 reduction-in-force, AEFA sought candidates to perform analysis within "multiple assigned sectors" covering "a combination of insurance, mortgage-related, technology and consumer industries."

During Wittenburg's tenure (1998-2003), females did not fare well in the Department. Few women were hired and fewer were promoted. In addition, the few female analysts either were terminated (Wittenburg), resigned (Kay Doremus, Maureen Pettirossi), transferred to a lesser position, or failed to receive a pay raise owed to them (Sandy Hollenhorst).

Following administrative exhaustion, Wittenburg filed suit in the District Court of Minnesota asserting that she was terminated by AEFA because of her age, then 51, in violation of the ADEA, and/or her sex, female, in violation of Title VII.[4] The District Court granted AEFA's motion for summary judgment and dismissed Wittenburg's complaint with prejudice. On appeal, the Eighth Circuit affirmed by opinion dated September 28, 2006.

The Eighth Circuit analyzed Wittenburg's discrimination claims under the *McDonnell Douglas* burden-shifting framework for circumstantial evidence cases of discrimination. The Court of Appeals assumed without discussion that Wittenburg had set forth a *prima facie* case of both age and sex discrimination. Thereafter, the Court found that AEFA had produced evidence of a non-discriminatory reason for Wittenburg's termination. The Court's analysis then turned to the final step of the *McDonnell Douglas* burden-shifting framework – pretext. The Court held that Wittenburg had failed **"to prove pretext"** in her age and sex discrimination claims and, therefore, affirmed the dismissal of those claims on summary judgment. In particular, the Court stated that "Wittenburg has failed to prove pretext in her age discrimination claim" and found that she had failed to meet her burden of proving that AEFA's proffered reason for her termination was a pretext for gender discrimination.

In evaluating Wittenburg's evidence of discriminatory statements, the Eighth Circuit applied a relevancy standard, sometimes referred to as the "stray remarks" doctrine, that required Wittenburg to establish a **"causal connection"** between her November 2003 termination and any discriminatory statement made by the employer. The Court of Appeals applied this standard to dismiss the discriminatory statements of Truscott, Rivera, and Forker because they purportedly lacked a

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[4] Wittenburg brought companion age and sex discrimination claims pursuant to Minnesota's Human Rights Act, MINN. STAT. §§ 363A.01 – .41.

causal connection to Wittenburg's termination. Similarly, the Court applied this standard to reject Mahowald's three statements reflecting his discriminatory bias because they also allegedly lacked a causal connection to Wittenburg's termination.

In addressing Wittenburg's evidence of pretext and discrimination, the Eighth Circuit **failed to review the entire record**. In particular, the Circuit Court reviewed each piece of evidence individually and in isolation without reference to other favorable evidence. Moreover, the Court ignored several pieces of evidence favorable to Wittenburg, and failed to draw all reasonable inferences in her favor as the nonmoving party.

Also, the Court of Appeals refused to permit an inference of age discrimination from the fact that Wittenburg's duties were assumed by two younger employees, in particular, Ramos, 40, and Roorda, 45. The Eighth Circuit stated that in order to permit an inference of age discrimination, the employee assuming her duties had to be **"substantially younger,"** citing *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 313 (1996). The Court of Appeals held as a matter of law that because Roorda was six years younger than Wittenburg he was not "substantially younger" to allow an inference of age discrimination.

In response to the Eighth Circuit's September 28, 2006 decision, Wittenburg timely filed a petition for rehearing. The Eighth Circuit denied that petition on November 16, 2006.

REASONS FOR GRANTING THE PETITION

Employment discrimination claims now make up a large percentage of the cases filed in federal court.[5] Unfortunately for plaintiffs, district courts grant summary judgment significantly more often in employment discrimination cases

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[5] *See* Leonidas R. Mecham, *Annual Report of the Director*, 2005 Jud. Bus. 129 tbl.C-2A, available at *http://www.uscourts.gov/judbus2005/appendices/c2a.pdf* (between 2001 and 2005, 7.5% of all cases filed in federal court were employment discrimination cases).

than in other types of cases,[6] with the percentage of motions granted in some districts approaching or exceeding 70%.[7] Several commentators have denounced the misuse of summary judgment in employment discrimination cases because those cases often turn on highly fact-intensive issues of motive, intent, and credibility which are better left for a trier of fact.[8] Moreover,

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[6] *See* Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, J. EMP. LEG. STUDIES, Vol. 1, No. 3 (Nov. 2004) at 11 & n.14 (remarking on the "readiness" of courts to grant summary judgment in civil rights cases).

[7] According to published decisions, the district courts in the Second Circuit granted summary judgment in favor of the employer **69.1%** of the time during the 2000-2001 time frame. Vivian Berger, et al., Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits, 23 HOFSTRA LAB. & EMPL. L. J., 45, 55 (2006). From 1995 to 2003, the Northern District of Illinois granted summary judgment in the defendant's favor more than **72%** of the time. Carolyn Shapiro, The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court, 63 WASH. & LEE L. REV. 271, 306 (2006). According to available opinions, from 1990 through April 2001, the District Court in Minnesota granted summary judgment in favor of the employer in **70.4%** of all discrimination claims; this figure rises to **79%** when partial grants of summary judgment are included. James G. Ryan, Recent Summary-Judgment Rulings by the Eighth Circuit Court of Appeals and the U.S. District Court of Minnesota ¶12 (2001 Upper Midwest Employment Law Handbook). Of the 21 known summary judgment motions in employment discrimination cases ruled upon by the trial judge below prior to *Wittenburg*, the Hon. Joan N. Ericksen granted total summary judgment to the defendant in 20 cases, and partial summary judgment in 1 case.

[8] *See e.g.*, *Melvin v. Car-Freshener Corp.*, 453 F.3d 1000, 1003-04 (8th Cir. 2006) (Sr. J. Donald Lay in dissent) ("Too many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain. This is especially true in cases where witness credibility will be determinative. In these instances, a jury, not the courts, should ultimately decide whether the plaintiff has proven her case."); Michael J. Zimmer, Slicing & Dicing of Individual Disparate Treatment Law, 61 LA. L. REV. 577, 592-603 (2001) (describing the misuse of summary judgment despite *Reeves*); Paul W. Mollica,

(Cont'd)

commentators have found this area of law to be "chaotic" and "often arbitrary" in which some judges are willing to grant summary judgment in cases that other judges would find worthy of a trial.[9] This Court should grant Wittenburg's petition for a writ of certiorari to provide much needed guidance in this uncertain area of the law, to resolve Circuit splits on several issues in the employment discrimination context, and to clarify this Court's proper standard for analyzing employment discrimination cases at the summary judgment stage under the *McDonnell Douglas* burden-shifting paradigm.

I. Review Is Warranted To Resolve A Conflict Regarding A Plaintiff's Burden On Summary Judgment With Respect to Pretext

The Circuit Courts are divided regarding a plaintiff's burden with respect to "pretext" at the summary judgment stage. The Eighth and Sixth Circuits actually require a plaintiff to prove pretext by a preponderance of the evidence in order to survive summary judgment. In contrast, the Third and Eleventh Circuits require a plaintiff to produce evidence from which a reasonable juror could infer pretext in order to avoid summary judgment. Wittenburg submits that the Eighth Circuit's standard erroneously confuses a plaintiff's ultimate burden at trial with a plaintiff's burden at summary judgment.

(Cont'd)

Federal Summary Judgment at High Tide, 84 MARQ. L. REV. 141, 168-70 (2000) (noting examples of misuse of summary judgment in employment discrimination cases).

[9] Shapiro, 63 WASH. & LEE L. REV. at 301; Marcia L. McCormick, The Allure and Danger of Practicing Law as Taxonomy, 58 ARK. L. REV. 159 (2005) (arguing that in applying the summary judgment tests in employment discrimination cases, courts have lost sight of the law); Catherine J. Lanctot, Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases, 61 LA. L. REV. 539, 540-61 (2001) (noting continued confusion in the lower courts over the method of proof due to the Supreme Court's lack of guidance in pretext cases).

A. The Eighth Circuit Conflicts With Other Circuits In Holding That A Plaintiff Must Prove Pretext By A Preponderance Of The Evidence In Order To Avoid Summary Judgment

There is a split among the Circuit Courts regarding a plaintiff's burden on summary judgment with respect to pretext. The Eighth Circuit, along with the Sixth Circuit, require a plaintiff to prove pretext by a preponderance of the evidence in order to survive summary judgment. *See e.g.*, *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 897-98 (8th Cir. 2004) ("in order to survive summary judgment, [plaintiff] must 'prove by **a preponderance of the evidence** that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'"); *Briggs v. Potter*, 463 F.3d 507, 515 (6th Cir. 2006) ("To make a submissible case on the credibility of his employer's explanation, the plaintiff is required to show by **a preponderance of the evidence** either (1) that the proffered reasons had no basis *in fact,* (2) that the proffered reasons did not *actually* motivate [the adverse employment action], or (3) that they were *insufficient* to motivate [the adverse employment action].") (italics in original) (citation omitted).

In contrast, several other Circuits, including the Third and Eleventh Circuits, merely require a plaintiff to produce evidence from which a reasonable juror could infer pretext in order to avoid summary judgment. *See e.g.*, *Tomasso v. Boeing Co.*, 445 F.3d 702, 706 (3d Cir. 2006) ("In order to create a genuine issue of material fact as to whether the proffered reasons are pretextual, Tomasso must 'point to some evidence, direct or circumstantial, from which a factfinder could reasonably'" infer pretext) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994));

Hurlbert v. St. Mary's Health Care System, Inc., 439 F.3d 1286, 1298 (11th Cir. 2006) ("To show pretext, a plaintiff must 'come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision.'") (quoting *Chapman v. Al Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc)); *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 221 (2d Cir. 2004). This Court should grant certiorari to resolve this split among the Circuit Courts.

B. The Eighth Circuit's Requirement That A Plaintiff Prove Pretext At Summary Judgment Erroneously Confuses The Plaintiff's Ultimate Burden At Trial With Her Burden At Summary Judgment

In this case, the Eighth Circuit applied its preponderance of the evidence standard to Wittenburg's evidence of pretext in affirming the District Court's grant of summary in favor of AEFA. In dismissing Wittenburg's age discrimination claim, the Eighth Circuit inventoried Wittenburg's pretext evidence and held that "Wittenburg ha[d] failed to *prove* pretext in her age discrimination claim." (Emphasis added). In dismissing Wittenburg's sex discrimination claim, the Eighth Circuit framed Wittenburg's argument as contending that she in fact had "*proved* that AEFA's proffered reason for her termination was a pretext for gender discrimination." (Emphasis added). The Eighth Circuit rejected Wittenburg's purported argument and held that Wittenburg had failed to prove pretext in her sex discrimination claim. Wittenburg respectfully submits that the "preponderance of the evidence" standard for assessing pretext on summary judgment used by the Eighth Circuit confuses the standards for summary judgment and an employment discrimination plaintiff's burden at trial.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted only if "there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law." FED. R. CIV. P. 56. The Supreme Court has pointed out that in response to a properly supported summary judgment motion this rule requires the nonmoving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[10] Critically, "the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (citation omitted). In other words, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

For the trial of an employment discrimination case such as this one where the plaintiff relies on circumstantial evidence, the three step burden-shifting indirect method of proof set forth in *McDonnell Douglas* applies. In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court described "the basic allocation of burdens and order of presentation of proof" prescribed by *McDonnell Douglas* in a disparate treatment case as follows:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving his prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

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[10] This requirement, however, "do[es] not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

> Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id., 450 U.S. at 252-53 (citations and internal quotations omitted).

In both *McDonnell Douglas* and *Burdine* the issues resolved by the Supreme Court arose in the context of a full bench trial, not on a motion for summary judgment. Thus, the proof paradigm used in those cases describes the burdens required of the parties to prevail at trial, not their burdens at summary judgment, which are instead addressed by the Court's "summary judgment trilogy" of *Matsushita*, *Catrett*, and *Anderson* as described above. Indeed, in *Burdine*, the Court concluded that the burden placed on the plaintiff by the third step of *McDonnell Douglas* "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," *Burdine*, 450 U.S. at 253, "now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256. Thus, the preponderance of the evidence standard generally required for plaintiffs to prevail at trial in other civil cases applies to the plaintiff's "ultimate burden" under *McDonnell Douglas*.[11]

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court addressed the question of

[11] In *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), another intentional discrimination case arising from "a full bench trial," *id.* at 505, the issue involved, not the summary judgment standard, but standard of proof at trial, *i.e.*, "whether [under the *McDonnell Douglas* framework] . . . the trier of fact's rejection of the employer's asserted reasons for the [employer's challenged] actions mandates a finding for the plaintiff." *Id.* at 504. The Court held that, rather than *compelling* a finding for plaintiff, "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of discrimination." *Id.* at 511.

"whether a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." Clarifying its holding in *Hicks*, the Court in *Reeves* held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148.

Pointing out that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that the inquiry under each is the same;"[12] *id.* at 150 (internal quotations and citations omitted), the Court did not purport to change that standard, but addressed the question of "what evidence a court is to consider in ruling on a Rule 50 motion." *Id.* at 149. The Court concluded that:

> in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions not those of a judge.

Id. at 150 (internal quotations and citations omitted). Therefore,

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's

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[12] While there is no way to be certain, this phrase and particularly the word "mirrors" may be producing confusion in judges' minds and ultimately among the Circuits about a plaintiff's pretrial evidentiary burden in employment discrimination cases as opposed to in the general run of civil cases controlled solely by the summary judgment trilogy.

> prima facie case,[13] the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-49. *Reeves* clearly established that while the plaintiff's ultimate burden at trial is to prove her case by the preponderance of the evidence, this standard is not applicable to either judgment as a matter of law or summary judgment.

While the trial court must evaluate the evidence in accordance with the *McDonnell Douglas/Burdine/Hicks/Reeves* quartet of cases, the summary judgment standard established by the Court in the *Matsushita/Catrett/Anderson* trilogy remains unchanged. This conclusion is bolstered by the Supreme Court's language in *Anderson*, 477 U.S. at 252, stating thirteen years after *McDonnell Douglas* that on a motion for summary judgment, the trial judge's function is *not* to weigh the evidence and make credibility determinations to decide if the plaintiff has *proved* her case by a preponderance of the evidence, but to determine "whether reasonable jurors *could find* by a preponderance of the evidence that the plaintiff is entitled to a verdict – 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it.'" *Id.* (emphasis added).

Wittenburg respectfully submits that the Eighth Circuit's standard misapplies to summary judgment the "preponderance of the evidence" standard which correctly is applied only to "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Reeves*, 530 U.S. at 143. The preponderance of the evidence standard is emphatically *not* applicable to summary judgment. The Eighth Circuit improperly imposed on Wittenburg the preponderance of the evidence standard applicable to her "ultimate burden" under the *McDonnell Douglas* proof scheme

[13] In the Eighth Circuit, the concession of a prima facie case deprives a plaintiff of the benefit of its strength.

rather than the proper summary judgment standard clarified in *Reeves*. The question at summary judgment is *not* whether the plaintiff proved pretext by a preponderance of the evidence, but whether the evidence presented is sufficient to permit the trier of fact to make such a finding. *Reeves*, 530 U.S. at 148. As the Eighth Circuit's decision in this case demonstrates, a requirement that a plaintiff must satisfy the preponderance of the evidence standard at summary judgment effectively insures that employment discrimination cases based on circumstantial evidence almost never will get to trial.

II. Review Is Necessary To Resolve A Conflict Concerning The Relevance Of Discriminatory Comments Of Non-Decision Makers And Non-Contemporaneous Discriminatory Comments Of Decision Makers

With respect to the stray remarks doctrine, there is a split among the Circuits about whether a plaintiff must establish a causal connection between a discriminatory statement and the decision at issue in order for that statement to be considered relevant evidence of discrimination. Wittenburg respectfully submits that the Eighth Circuit's "causal connection" requirement erroneously discounts the importance of context in employment discrimination cases in derogation of Supreme Court pronouncements and unfairly cripples a plaintiff's ability to circumstantially prove discrimination.

A. The Eighth Circuit Conflicts With Other Circuits In Holding That A Plaintiff Must Establish A Causal Connection Between A Discriminatory Comment And The Decision At Issue In Order For That Comment To Considered Relevant.

The Eighth, Fourth, Fifth, and Tenth Circuits require plaintiffs to establish a causal connection between a discriminatory comment or attitude in the workplace and the adverse employment action at issue in order for that comment or attitude to be considered relevant evidence of discrimination. *See e.g.*, *Wittenburg*, 464 F.3d at 837 (plaintiff "must establish '*some* causal relationship' to show 'the significance of

[decisionmakers'] non-contemporaneous statements or statements made by persons other than the relevant decision-maker, to the resolution of the ultimate issue of intentional discrimination.'"); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir.1999) ("[T]o prove discriminatory animus, the derogatory remark cannot be stray or isolated and unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of discrimination."); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1209-10 (10th Cir.1999) (recognizing that derogatory "comments may serve as circumstantial evidence of discrimination, [but] the plaintiff must still show some nexus between the statements and the defendant's decision to terminate the employee"); *Rubinstein v. Administrators of Tulane Ed. Fund*, 218 F.3d 392, 400-01 (5th Cir. 2000).

In contrast, the Third, Sixth, and Eleventh Circuits do not require plaintiffs to show a specific causal connection between discriminatory comments and the adverse employment action in order to consider those comments as relevant evidence of discrimination. The Third Circuit has recognized that "discriminatory comments by nondecision makers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination." *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995). The Sixth Circuit has noted that "[a]lthough . . . a direct nexus between the allegedly discriminatory remarks and the challenged employment action affects the remark's probative value, the absence of a direct nexus does not necessarily render a discriminatory remark irrelevant." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355-56 (6th Cir. 1998). Similarly, the Eleventh Circuit has held that discriminatory comments which are remote in time or not directed at the plaintiff may still contribute to a circumstantial showing of discriminatory intent. *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998). This Court should grant certiorari in the instant case to address this split among the Circuit Courts concerning the "stray remarks" doctrine.

B. The Eighth Circuit's Requirement That A Plaintiff Establish A Causal Connection Between A Stray Remark And The Decision At Issue Erroneously Denies The Importance Of Context In Building A Circumstantial Case Of Discrimination.

Wittenburg submits that the "causal connection" requirement should be rejected outright and federal courts should analyze "stray remarks" under the normal relevancy standard set forth in Rule 401 of the Federal Rules of Evidence. As this Court has recognized, "the question facing triers of fact in discrimination cases is both sensitive and difficult," and "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). As a result, plaintiffs are encouraged to prove discrimination with circumstantial evidence. *See McDonnell Douglas Corp.*, 411 U.S. at 800-801. Circumstantial evidence is not only a sufficient form of evidence to prove discrimination, "but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quotation omitted).

In analyzing any employment discrimination case, "[c]ontext matters." *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006). "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998)). In *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), this Court found erroneous a Circuit Court's holding that the term "boy" alone without any racial modifier never could be considered probative of racial bias. *Ash*, 126 S. Ct. at 1195-96. In so finding, this Court stated that while the term "boy" will not always be evidence of racial animus, it did not mean that the term is always benign, and that "[t]he speaker's meaning may depend on

various factors including context, inflection, tone of voice, local custom, and historical usage." *Id.*

The "stray remarks" approach adopted by the Third, Sixth, and Eleventh Circuits, unlike the approach adopted by the Eighth, Fourth, Fifth, and Tenth Circuits, is consistent with these Supreme Court pronouncements. Under that approach, plaintiffs are permitted to use "stray remarks" to show a discriminatory corporate atmosphere or context in which the adverse decision was made. *See Ercegovich*, 154 F.3d at 356-57; *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3d Cir. 1997) (stating "a plaintiff may offer circumstantial proof of intentional discrimination on the basis of age in the form of a supervisor's statement relating to formal or informal managerial attitudes held by corporate executives"); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333 (3d Cir.1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir.1989). Contextual evidence of a discriminatory corporate atmosphere "in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff." *Ercegovich*, 154 F.3d at 356-57; *Vessels v. Atlanta Ind. School Sys.*, 408 F.3d 763, 771 (11th Cir. 2005) (although evidence of racist statements is insufficient for a direct evidence case, "it can be relevant in the circumstantial framework to show that the employer's proffered reasons were pretextual"). Indeed, evidence of a discriminatory corporate atmosphere is "often crucial" to an assessment of pretext as well as the ultimate question of discrimination, particularly "as sophisticated discriminators render their actions increasingly more subtle to circumvent adverse judicial precedent." *Ryder,* 128 F.3d at 133.

Under the approach of the Third, Sixth, and Eleventh Circuits, plaintiffs also can use discriminatory statements by decision makers unrelated to the adverse employment action at issue to show discriminatory bias. *See Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *Johnson v. Kroger Co.*, 319 F.3d 858, 868 (6th Cir. 2003); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000) (evidence of

age animus included plaintiff's testimony that the decision maker told him that he "was so old [he] must have come over on the Mayflower" and that the plaintiff "was too damn old to do [his] job."); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 733 (3d Cir.1988) (upholding admissibility of discriminatory comment by decision maker made five years before denial of tenure). Evidence that a decision maker harbored a discriminatory bias undoubtedly is relevant to determining whether the adverse employment decision resulted from discriminatory motives. *Id.* Furthermore, in assessing more than one biased remark, these courts do not view each remark in isolation, "but are mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus." *Ercegovich*, 154 F.3d at 356.

In this case, the Eighth Circuit used its "causal connection" standard to erroneously reject Wittenburg's evidence of a discriminatory corporate atmosphere and of Mahowald's discriminatory animus against females. The Court of Appeals rejected Truscott's statement that occurred when AEFA was preparing to reduce employees that it was willing to hire and grow "*younger* portfolio managers and analysts," concluding that it was nothing more than "a generalized statement" that did not evince "a discriminatory policy or practice" nor "establish that age was the basis for Wittenburg's termination."[14] Likewise, the Court rejected Rivera's statement that AEFA had made a decision to retain *younger* workers because they allegedly had more years of service ahead of them merely because Rivera was not a decision maker in Wittenburg's termination (although he was a decision maker in the first of the three RIFs) and his statement "could be characterized as a non-contemporaneous, non-decisionmaker's opinion about company retention policy during a prior RIF." Moreover, the Eighth Circuit rejected Forker's reference that AEFA wanted to

[14] Wittenburg submits that this evidence shows that Truscott did have age on his mind during the "make-over" which, in turn, makes it more likely that Wittenburg was terminated because of her age.

hire a "*jr. person.*" because Wittenburg failed to demonstrate that Forker equated "junior person" to a "younger person," or how such a notation related to her own termination, despite the fact that Wittenburg presented evidence that just three weeks after the second reduction Mahowald hired a 39 year old analyst into the EID. Although the Court did discuss the statements of Truscott, Forker, and Rivera as a group, it never considered their statements in relation to any other favorable evidence and concluded, not surprisingly, that these statements alone "fell short of establishing pretext."

The Court of Appeals addressed each of Mahowald's discriminatory statements individually and found that each one lacked the requisite causal connection to Wittenburg's termination. According to the Court, Mahowald's statement to Doremus that she had to make "concessions" because male analysts were the sole support of their families was not causally connected to Wittenburg's termination because it was made 4 years prior thereto and before Mahowald had become a supervisor. The Court failed to realize that this comment was buttressed by Mahowald's later prejudicial comments. Although the Court did concede that Mahowald's justification for hiring Brumley (unemployed for 10 months and had a family to support) reflected a bias in favor of male breadwinners, it nevertheless concluded that this statement alone could not prove gender discrimination. Similarly, the Court found that Mahowald's statement contemporaneous to Wittenburg's termination, "Your husband has a job, doesn't he," did not prove that AEFA terminated Wittenburg because of her gender "in the absence of other proof." In this case, the Eighth Circuit through its application of the "stray remarks" doctrine unjustly denied Wittenburg the opportunity to prove discrimination with circumstantial evidence of a discriminatory corporate atmosphere and a decision maker's discriminatory bias.

III. Review Is Necessary To Resolve A Conflict Concerning The Proper Review Standard For Analyzing A Plaintiff's Evidence On Summary Judgment

A conflict exists among the Circuits regarding the proper standard for analyzing an employment discrimination case on summary judgment under the *McDonnell Douglas* framework. The Third Circuit finds that a court must view the record as a whole picture and thereafter "determine whether *the totality of the evidence* would allow a reasonable factfinder to conclude that [the plaintiff] has established the alleged bias." *Bray v. Marriott Hotels*, 110 F.3d 986, 991 (3d Cir. 1997) (emphasis in original). According to the Third Circuit: "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1484 (3d Cir.1990). In contrast, the Eighth Circuit, among others, fails to view the record as a whole and addresses each piece of evidence individually and in isolation and often concludes that none of them creates a material issue of fact. *See e.g.*, *Wittenburg*, 464 F.3d 836-842 (addressing pretext evidence as "First," Second," "Third," "Fourth," "Fifth," "Finally"); *Canady v. Wal-Mart Stores, Inc.*, 440 F.3d 1031, 1036 (8th Cir. 2006) (Sr. J. Lay in dissent) (majority failed to view record as a whole in granting summary judgment against terminated employee in hostile work environment and disparate treatment claims where supervisor repeatedly called plaintiff a "lawn jockey," used the word "nigger" in front of him, greeted plaintiff with the phrase, "What's up my nigga?," and told plaintiff that a black man's skin color rubs off on a towel when he sweats); *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 685 (7th Cir.2000) (failing to consider evidence supportive of prima facie case in analysis of pretext).[15] Based on this split in the Circuits, this Court should grant Wittenburg's petition for a writ of certiorari.

[15] *See also* Arthur R. Miller, The Pretrial Rush to Judgment, 78 N.Y.U. L. Rev. 982, 1071 (2003) (noting temptation when viewing (Cont'd)

Wittenburg respectfully submits that the Third Circuit's totality of the evidence standard for analyzing pretext at the summary judgment stage is in keeping with this Court's pronouncements. In *Reeves*, this Court clarified the proper summary judgment standard for analyzing an employment discrimination case. *See Reeves*, 530 U.S. at 150-51. According to the Court, a court must review "all of the evidence in the record." *Id.*, 530 U.S. at 150; *see also Matsushita*, 475 U.S. at 587 (court must review the record "taken as a whole" on summary judgment). In doing so, however, a court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* According to the Court, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions not those of a judge." *Id.*

In applying this standard in *Reeves*, the Court admonished the Court of Appeals for not reviewing all of the evidence in the record. *Id.*, 530 U.S. at 152. In particular, the Court found that the lower court erroneously disregarded "critical evidence favorable to plaintiff" that supported plaintiff's *prima facie* case and that undermined the employer's nondiscriminatory explanation. *Id.* In addition, the Court admonished the Court of Appeals for failing to draw all reasonable inferences in favor of the plaintiff as the nonmoving party. *Id.* As examples, the Court noted that the lower court had erred by discounting certain age-

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(Cont'd)
material on a pretrial motion without the safeguards of a trial setting "to treat the evidence in a piecemeal rather than a cumulative fashion, draw inferences against the nonmoving party, or discount the nonmoving party's evidence by weighing it against contradictory evidence."); McCormick, The Allure and Danger of Practicing Law as Taxonomy, 58 ARK. L. REV. at 183 (noting that the *McDonnell Douglas* test itself causes some courts "to get bound up in the taxonomy of the evidence, placing each piece into a separate box and evaluating each box separately rather than looking at the whole picture to determine whether discrimination occurred.").

related comments because they were not made in the context of the plaintiff's termination, by discrediting the plaintiff's evidence regarding the identity of the decision maker while crediting the employer's evidence that others also involved in the termination decision were not motivated by age animus, and by crediting the employer's evidence that on occasion others outside the protected class were treated the same as plaintiff or that others within the protected class were treated favorably by the employer. *Id.*, 530 U.S. at 152-53. Based on these examples, the Court concluded that "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* 530 U.S. at 153.

In this case, it is clear that the Eighth Circuit failed to review the record as a whole in derogation of *Reeves* and *Matsushita.* The Court of Appeals disregarded critical evidence supportive of Wittenburg's prima facie cases and that undermined AEFA's sole reliance on her disputed 2002 performance evaluation to justify her termination. In assessing pretext, the Court failed to consider Wittenburg's qualifications as an analyst in that she consistently provided excellent service and was voted "Analyst of the Year." The Court also failed to consider that the decision makers involved in her termination and the performance evaluation used to trigger her termination, Truscott and Mahowald, were substantially younger than she. In addition, the Court never addressed Mahowald's written "bullsh-t" comment in connection with the performance evaluation process which called into question the validity of his ensuing personnel ratings.

Likewise, the Court failed to address when Wittenburg presented Mahowald with the Starmine evidence demonstrating her high 2002 performance that Mahowald had agreed with her that the 2002 G/4 rating did not make sense. Moreover, the Court never dealt with Mahowald's statements to Wittenburg in September 2003, shortly before the November reduction-in-force, that she should not worry about her G/4, that her numbers were very good, and AEFA was "happy" with her performance.

Further, the Court ignored portfolio manager Kennedy's specific request to management to retain Wittenburg because of the fine work she had done. Finally, the Court failed to consider the evidence that the few female analysts in the Department besides Wittenburg had suffered various degrees of prejudicial treatment.

The Court of Appeals also viewed the evidence supportive of Wittenburg's claims in complete isolation. For example, the Court dismissed the fact that Wittenburg was only one of two females in a 26 person department because that evidence "*alone* is insufficient to show discriminatory animus." Similarly, the Court discarded Wittenburg's evidence that Mahowald stated "Your husband has a job, doesn't he?" within hours of her termination because "[i]nferring gender bias on this statement *alone* is not reasonable." As mentioned previously, the Court considered the discriminatory statements of Truscott, Rivera, and Forker as a group but held that those three statements in and of themselves were not sufficient to prove pretext. Based on the Court's seriatim consideration, isolation, and rejection of the evidence, it is clear that the Court failed to consider the totality of the evidence in ruling on the motion for summary judgment.

It is also clear that the Court of Appeals failed to draw reasonable inferences from the evidence in Wittenburg's favor as the nonmoving party. For example, the Court found that Mahowald had rated Wittenburg's 2002 performance as a G/3 and that a review committee lowered it to G/4, despite the fact that Wittenburg had produced a memo showing that Mahowald in fact had rated her a G/4. Similarly, the Court credited Mahowald's explanation that Wittenburg did not receive credit for being the only analyst to evaluate unrated stocks because her efforts allegedly did not result in a profit, over Wittenburg's evidence that evaluating those stocks in and of themselves was Mahowald's "number one priority." Furthermore, Truscott had referenced the failure to evaluate those stocks as a justification for Wittenburg's termination, which was false and pretextual as applied to her. In addition, the Court found that Wittenburg

did not dispute that Ramos' ratings were better than hers when in fact Wittenburg's main arguments were that her 2002 performance evaluation was biased, inaccurate, and discriminatory, and that Ramos had received an L/1 ultimately because of his age and gender.

The Court of Appeals also failed to credit Wittenburg's evidence that as a result of the "make-over" the 8 oldest analysts had been terminated or resigned. Instead, the Court credited the employer's evidence that a number of individuals in the protected class had been retained, even though only one was above 50 years of age (51) and the rest were under 50. Similarly, the Court refused to credit Wittenburg's evidence that Mahowald and Rivera had rated her as "maybe drop" and younger males as "keep" despite the fact that her overall rating was higher than theirs. Rather, the Court credited the employer's evidence that a couple of the younger males had received higher scores than Wittenburg in certain sub-categories, although not in the overall ratings.

The Court of Appeals further refused to draw an adverse inference from the fact that Mahowald never provided Wittenburg with a copy of her 2002 performance evaluation because Mahowald did not provide any analyst with a written review. The Court overlooked the fact that Wittenburg repeatedly had contested her performance rating and that Mahowald had promised her a copy "in the near future." Given these facts, a reasonable juror could question AEFA's sole reliance on this particular performance evaluation to justify Wittenburg's termination. Furthermore, the Court failed to credit Wittenburg's evidence that within months of the November 2003 RIF, AEFA solicited analysts to cover "multiple assigned sectors," including "insurance, mortgage-related, *technology* and consumer industries," where AEFA had justified its November 2003 RIF based on a purported desire to retain individual sector expertise. Instead, the Court credited the employer's claim that these new "multiple assigned sector" positions were not "substantially

similar" to Wittenburg's Technology Sector position to permit an inference of pretext.

Based on the Eighth Circuit's failure to review the record as a whole and draw all inferences in Wittenburg's favor, the Circuit Court of Appeals impermissibly weighed the evidence, made credibility determinations, and substituted its judgment for that of a jury's. Accordingly, this Court should grant Wittenburg's petition for certiorari in order to reinforce and clarify the teachings of *Reeves* and the importance in employment discrimination cases on summary judgment of reviewing the evidence in the record as a whole and of drawing all inferences in favor of the nonmoving party.

IV. Review Is Necessary To Resolve A Conflict Whether A Six Year Age Difference Between A Plaintiff And Her Replacement Is Sufficient To Permit An Inference Of Age Discrimination

In *O'Connor*, this Court held that an age discrimination plaintiff did not have to show that he was replaced by someone outside of the protected class in order to establish a *prima facie* case of discrimination. *O'Connor*, 517 U.S. at 312-13. Rather, a plaintiff only had to present evidence to create an inference of age discrimination. *Id.* According to the Court, such an inference could be drawn, for example, where the replacement is "substantially younger" than the plaintiff. *Id.* The Circuit Courts since have grappled with the meaning of the phrase "substantially younger" and come to differing conclusions. *See Grosjean v. First Energy Corp.*, 349 F.3d 332, 338 (6th Cir. 2003) (collecting cases).

With respect to the specific issue whether a six year difference is "substantially younger" to permit an inference of age discrimination, the Circuits are split. On the one hand, the Eleventh Circuit relying on its own precedent has found that a six year age difference between a plaintiff and her replacement is sufficient to create an inference of age discrimination. *Damon v. Fleming Supermarkets Of Florida, Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999) (five years sufficient). On the other hand, the

Eighth and Sixth Circuits have concluded that a six year difference is not substantially younger to permit the age discrimination inference. *Wittenburg*, 464 F.3d at 840 (6 year difference is not substantially younger); *Grosjean*, 349 F.3d at 340 (holding that "age difference of six years or less between an employee and a replacement is not significant").

The Tenth Circuit specifically rejected the Sixth Circuit's bright line test in *Whittington v. Nordam Group Inc.*, 429 F.3d 986 (10th Cir. 2005). In declining to establish any rigid barriers, the Court found that a five year age difference between a plaintiff and his replacement "should be but one factor weighed by the jury." According to the Court:

> We are not convinced that all five-year age differences are the same. The replacement of a 45-year-old by a 40-year-old would be less suspicious than the replacement of a 62-year-old by a 57-year-old. Comparing a 62-year-old worker with one who is 57, an employer may think it better to retain someone who will stay with the company another eight years (until age 65) rather than one who would be retiring in three years, less than half the time. Or a company may simply wish to rid itself of its older workers, beginning with the oldest.

Id., 429 F.3d at 996. The Third Circuit appears to follow a similar path: "there is no 'particular age difference that must be shown,' but while '[d]ifferent courts have held . . . that a five year difference can be sufficient, . . . a one year difference cannot.'" *Showalter v. Univ. of Pittsburgh*, 190 F.3d 231, 236 (3d Cir. 1999). Wittenburg respectfully submits that this Court should grant certiorari in this case to resolve the split in the Circuits about whether a six year age difference can be "substantially younger" and, in doing so, should find like the Tenth and Third Circuits that such an age differential may permit an inference of age discrimination based on the totality of the evidence.

CONCLUSION

The Eighth Circuit and other Courts of Appeal are defeating the intent of Congress and resisting the teachings of this Court in order to avoid trials in employment discrimination cases. In various Circuits, summary judgment practice forces plaintiffs to prove pretext, link discriminatory remarks to the ultimate discharge decision, have their evidence judged in isolation rather than organically, and face an inflexible rule on age differential regardless of context. In circumstantial cases, where victims of discrimination cannot produce direct evidence, one must question whether these causes of action remain worth pursuing.

For all the foregoing reasons, Petitioner Wittenburg respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED SEPTEMBER 28, 2006

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 05-4038.

Bonnie WITTENBURG,

Appellant,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,

Appellee,

American Association of Retired Persons, Amicus on Behalf of Appellant.

Submitted: May 19, 2006.

Filed: Sept. 28, 2006.

Rehearing and Rehearing En Banc Denied Nov. 16, 2006.*

Before BYE, HANSEN, and SMITH, Circuit Judges.

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* Judge Riley did not participate in the consideration or decision of this matter.

Appendix A

SMITH, Circuit Judge.

Bonnie Wittenburg, a former Equity Research Analyst for American Express Financial Advisors, Inc.'s ("AEFA") Equity Investment Department ("EID"), brought this employment discrimination suit against AEFA, asserting gender discrimination and age discrimination in AEFA's termination of her employment. AEFA filed a motion for summary judgment, which the district court[1] granted. Wittenburg appeals, arguing that she presented sufficient evidence to support her age and gender discrimination claims. We affirm.

I. *Background*

AEFA provides financial planning, advice, asset management, insurance, and annuities to clients, primarily through a network of financial advisors; in addition, AEFA manages mutual funds. In November 1998, AEFA hired Wittenburg, then age 46, to work in its Minneapolis office as an Equity Research Analyst in the Technology Sector of the EID. When AEFA hired Wittenburg, she was one of two female analysts in an approximately 26-person department. According to Raymond Hirsch, former Group Director of the Technology Sector, Wittenburg worked hard, displayed "excellent investment skills," and provided "first class service" to the portfolio managers. In fact, Wittenburg was named "Analyst of the Year" in 2000 because of her "outstanding efforts and achievements."

1. The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

Appendix A

In Fall 2001, AEFA hired Ted Truscott as its Chief Investment Officer ("CIO") to manage all investment activity at AEFA. As CIO, Truscott directly supervises the senior portfolio managers in the EID who, in turn, supervise the associate portfolio managers and analysts. Analysts do not report directly to Truscott. Truscott subsequently promoted analyst Tom Mahowald to the position of Director of Equity Research, thereby making Mahowald Wittenburg's direct supervisor. Thus, Wittenburg reported to Mahowald, and Mahowald reported to Truscott.[2]

In February 2002, Truscott initiated a two-year project to redesign the EID. The redesign project involved the addition of three portfolio managers hired from a competitor, the creation of a new satellite office in Boston, and the merger or movement of certain funds to AEFA's satellite offices in San Diego, Boston, and New Jersey. In discussing AEFA's hiring of the three new portfolio managers, Truscott stated that AEFA planned on hiring more managers in Boston because AEFA "need[ed] to be competitive as the best fund families out there. We will hire talent where we feel we have gaps. That said, we are not averse to hiring younger portfolio managers or analysts and growing them."

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2. In late 1999, when Mahowald was still an analyst, he had a conversation with Kay Doremus, a fellow analyst, about the chief of the investment department's comment that one analyst would be eliminated per year. Doremus expressed her fear to Mahowald that she would be fired because she received a written performance warning. Mahowald agreed that AEFA tended to terminate one person per year, but he commented that "you have to make concessions because a lot of these guys are the sole support for their families." At the time, Doremus was the major breadwinner for her family.

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As part of the February 2002 redesign plan, AEFA included a reduction-inforce ("RIF"), which, according to Truscott, was necessary and "related to the transfer of investment portfolios to the newly formed Boston office." The February 2002 RIF involved only portfolio managers. One of the portfolio managers terminated in the RIF was Al Henderson, age 62. According to Henderson, Dan Rivera, Head of the Equities Department and a decisionmaker in the February 2002 RIF, told him that he was fired because AEFA wanted to retain "those that were younger" because younger employees have "more years of service ahead of them."

The second RIF occurred in June 2002 and was, according to Truscott, "related to the transfer of portfolios to the then being established San Diego office." This RIF primarily impacted portfolio managers; however, three analyst positions in Minneapolis were also eliminated.[3] As part of the redesign process, a team comprised of Human Resources Relationship Leader Judith Forker, Mahowald, Portfolio Managers Dan Rivera, Warren Spitz, Gordon Fines, and Human Resources personnel Patty Bales and Craig Dewald, created a talent review of the approximately 25 people in the department. This review included performance ratings for each analyst for the years 1999, 2000, and 2001, unless the analyst had not been employed during some or all of those years. In addition, the review evaluated the analyst's independent researching skills, communication skills, and

3. A document entitled "Equity Investments Group Strategy: Reorganization Impacts," shows a total analyst reduction of seven analysts in the June 2002 RIF. Three analysts would be displaced, two analysts would be transferred, and two analysts would make "assumed moves" to the portfolio team.

whether the analyst was a team player. The review also indicated whether the analyst was a "keep," "maybe keep," "maybe," "maybe drop," or "drop." These ratings were generated to educate the leaders about the individuals working in the department and to identify employees in the department that might be affected by the reorganization.

In late 2002, the EID held its ratings alignment meeting attended by Truscott, Mahowald, Forker, Director of Compensation Sherry Johnson, and Portfolio Managers Spitz, Fines, Rivera, John Schonberg, and Jim Johnson. The group first discussed Mahowald's proposed ratings for each of the analysts, including Wittenburg. The proposed ratings were subject to change based on the group's discussion.[4] Mahowald's proposed rating for Wittenburg was G3/L3, but after the ratings alignment meeting, her 2002 rating was lowered to a G4/L3. The other Technology Sector analysts' ratings in 2002 were: G3/L3 for David Friedrichsen (age 40),

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4. At the end of each year, AEFA reviews employees' performances. Each employee receives two ratings at the end of the year: one for goal achievement, the "G" rating, and one for demonstration of leadership competencies, the "L" rating, with 1 being the highest rating and 5 being the lowest rating. The year-end performance evaluation begins in September with the entry of performance data for each analyst into AEFA's human resources system. This data includes analysts' self-appraisals, which were submitted to Mahowald for his review and comments, and a preliminary performance rating determined by Mahowald based on the comments of portfolio managers, his own comments, and the information available to him at the time with respect to analysts' recommendations verses the "S & P 500" and the investment "universe."

G3/L1 for Kurt Lauber (age 35), and G3/L1 for Dean Ramos (age 39).

Wittenburg's low rating in 2002 was mainly because of her poor performance on funds and negative input she received from portfolio managers. Although Wittenburg was the only analyst to complete a special project that Mahowald assigned, which consisted of picking up unrated stocks in the fourth quarter of 2002, her ratings on those stocks did not help the portfolio managers make money and consequently was not a positive consideration in her rating.[5]

Wittenburg complained about her 2002 rating to Mahowald. At that time, she asserted that her G4 rating was too low based on "Starmine" data for 2002. Starmine rated Wittenburg's 2002 performance highly, awarding her four stars out of a maximum of five stars. Wittenburg, however, acknowledged that Mahowald did not have access to the Starmine information on her 2002 performance when he gave her the G4 rating. Mahowald agreed with Wittenburg about what the "Starmine" data showed, but he disagreed that the data should have impacted her performance rating,

5. Wittenburg was not assigned a special "private placements" project that Mahowald assigned to Ramos and Lauber. Ramos and Lauber received L1 scores, in part, because of this special project. Mahowald testified in his deposition that AEFA "had significant private placement activities and we had a portfolio that had lots of private placements in it and those stocks that went into that portfolio needed to be covered by the analysts. And so if that private placement was done in that analyst's area of expertise, they logically had extra work to do to research and recommend and otherwise monitor that investment."

considering AEFA does not use the Starmine data for evaluating performance.[6] According to Mahowald, "Starmine was a system that [he] was looking at to evaluate analysts' performance. [He] started that in 2003. In doing so, [AEFA] fed Starmine historical data [for] 2002." AEFA uses Starmine as an "analyst tool."

In September 2003, Truscott informed Mahowald that a third RIF would occur. In October 2003, Mahowald, Forker, Chief Administrative Officer Pete Gallus, Director of Compensation Sherry Johnson, Schonberg, Spitz, and Bales met to determine how many analysts AEFA would need to cover each of the sectors of mutual fund products located in Minneapolis. They determined that AEFA only needed to retain one Technology Sector analyst based on business need; therefore, three of the four Technology Sector analyst positions would be eliminated. To implement the RIF, AEFA used the multiple incumbent process.[7] Consistent with that process, the performance ratings of analysts for 2002 and, in the event of a tie, 2001, were used in determining which analysts within each sector to terminate. Like all other analysts, Wittenburg's 2002 ratings were used.

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6. When counsel for AEFA asserted that AEFA did not use the Starmine data for evaluating performance, Wittenburg agreed, stating, "That is correct. But AEFA did feed Starmine data. They had our data."

7. AEFA applied the multiple incumbent process to analysts by sector-financial, consumer, industrial, health care, and technology-as opposed to grouping all of the analysts into one big "pool" as AEFA did in the 2002 RIF.

Appendix A

With regard to the Technology Sector, AEFA terminated Wittenburg, age 51, in the third RIF, along with Friedrichsen, age 41, and Lauber, age 36. Only Ramos, age 40, was retained. All of the sectors combined had a total of 17 analysts, 11 of which were 40 years or older and 2 of which were women. Ultimately, of the 7 analysts selected for job elimination, 4 were 40 years or older and 1, Wittenburg, was a woman. AEFA retained 51-year-old Sandy Hollenhorst, who was hired by Mahowald in 2001.

AEFA notified Wittenburg of her position elimination on November 18, 2003, in a meeting with Truscott and Forker. Wittenburg asked why AEFA selected her position for elimination. Truscott and Forker explained that the decision was based on AEFA's desire to keep only one Technology Sector analyst; therefore, based on her low 2002 rating, she was identified as one of the three analysts for termination. When Wittenburg told Truscott that she disputed her G4/L3 rating, Truscott, according to Wittenburg, "start[ed] going on about in '02 people did not rate the six rated stocks." Wittenburg, however, did not respond to Truscott. She was upset that she "was not given credit" for "getting the six rated stocks" because she was the only person in her department who had. Wittenburg's employment with AEFA ended on January 9, 2004. According to Wittenburg, within hours of her termination, Mahowald spoke with her and said, "Your husband has a job, doesn't he?"

After her termination, Wittenburg sought a position as a portfolio manager at AEFA but was not hired. She subsequently brought suit against AEFA, asserting claims of age discrimination under the Age Discrimination in

Employment Act (ADEA), 29 U.S.C. §§ 621-634, gender discrimination under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, and gender and age discrimination under the Minnesota Human Rights Act (MHRA), Minn.Stat. §§ 363A.01-.41. Wittenburg now appeals the district court's grant of summary judgment to AEFA on her gender discrimination and age discrimination claims.

II. *Discussion*

Wittenburg argues that the district court erroneously granted summary judgment to AEFA on her age and gender discrimination claims because material issues of fact remain unresolved.

We review the district court's grant of summary judgment de novo. *Wallace v. Sparks Health Sys.*, 415 F.3d 853, 858 (8th Cir.2005). Therefore, "our task in this appeal is to decide whether the record reveals issues of material fact that would prevent the entry of summary judgment in favor of [AEFA]." *Id.* at 860. In completing this task, we are mindful that we "do not sit as a super-personnel department to review the wisdom or fairness of [AEFA's] job-elimination policies during the RIF." *Id.*

We apply the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This analysis requires the plaintiff to establish a prima facie case of discrimination. *Id.* We, like the district court, assume without deciding that

Wittenburg established a prima facie case of both age and gender discrimination.[8]

In addition, both parties agree that AEFA proffered a legitimate, nondiscriminatory reason under the *McDonnell Douglas* test for Wittenburg's termination in the November 2003 RIF: that AEFA conducted a RIF in 2003 based on financial and business reasons and terminated Wittenburg during the RIF on the basis of her low 2002 performance rating. Accordingly, our task is to determine whether a genuine issue of material fact remains whether AEFA's non-discriminatory reason was pretextual. *Id.* at 804, 93 S.Ct. 1817.

A. *Age Discrimination*

Wittenburg argues that she presented sufficient evidence from which a reasonable fact-finder could conclude that age played a role in her termination and that AEFA's proffered reasons for her termination are pretextual.

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8. To establish a prima facie case of age discrimination resulting from a RIF, the plaintiff must show that (1) she is at least 40 years old; (2) she was qualified for the job; (3) she was discharged; and (4) age was a factor in the employer's decision to terminate her. *Chambers v. Metro. Prop. & Cas. Ins. Co.*, 351 F.3d 848, 855 (8th Cir.2003). To establish a prima facie case of gender discrimination, the plaintiff must show that (1) she is a member of a protected class; (2) she was qualified for the job; (3) she was subjected to an adverse employment decision; and (4) she was treated differently than similarly-situated males. *Hesse v. Avis Rent A Car Sys.*, 394 F.3d 624, 631 (8th Cir.2005).

Appendix A

First, Wittenburg relies on the following statements of AEFA personnel to support her age discrimination claim: (1) Truscott's statement that AEFA is "not averse to hiring younger portfolio managers or analysts and growing them;" (2) Forker's 2002 notes indicating that the analyst department would "maybe add a junior person;" and (3) Rivera's comment during the February 2002 RIF that AEFA wanted to retain "those that were younger" because they have "more years of service ahead of them."

A plaintiff must establish " *some* causal relationship" to show "the significance of [decisionmakers'] non-contemporaneous statements, or statements made by persons other than the relevant decision-maker, to the resolution of the ultimate issue of intentional discrimination." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir.1995) (emphasis in original). Therefore, we consider factors such as (1) whether the statements were made by employees who took part in the decision or influenced the decision to terminate the plaintiff; (2) the time gap between when the statements were made and the date of termination; and (3) "whether the statement itself" is "an exhibition of discriminatory animus" or merely an "opinion that such animus might exist." *Id.; see also Frieze v. Boatmen's Bank of Belton,* 950 F.2d 538, 542 (8th Cir.1991) (holding that comments from the president of the company did not "create a reasonable inference of discrimination" because the president's comment to the employee that he had "waited too long . . . to start [his] effort towards becoming president of a bank and [the employee] would never make it" was made four years before the employee was discharged and before the president was actually the president).

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Truscott, a decision-maker, made a general statement regarding the company's willingness to hire younger workers. Such a generalized statement does not evince a discriminatory policy or practice, nor does it tend to establish that age was the basis for Wittenburg's termination over a year later. The facts as alleged by Wittenburg do not establish any causal connection between Truscott's statement and her termination.

Likewise, Forker's reference to "junior person" in her notes does not show discriminatory intent. Wittenburg has failed to present evidence that Forker equated "junior person" to a "younger person" or how such a notation relates to her termination in the 2003 RIF.

Additionally, Wittenburg admits that Rivera was only a decisionmaker in the initial phase of the department downsizing, not in the 2003 RIF. Rivera's comment could be characterized as a non-contemporaneous, non-decisionmaker's opinion about company retention policy during a prior RIF. Taken together, these comments by AEFA personnel fall short of establishing pretext in AEFA's stated nondiscriminatory purpose given for her termination.

Second, Wittenburg points out that AEFA "got rid" of the eight oldest analysts in the department by the end of the "two-year makeover plan" and gave four of the five oldest analysts low G4 or L4 ratings in 2002, thereby setting them up for termination in the 2003 RIF.[9] Wittenburg, however, ignores evidence that several members of the protected class

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9. Only six of the eight analysts were actually terminated; two of the analysts resigned.

survived the RIFs. Out of 31 analysts affected by the 2002 and 2003 RIFs, 17 were 40 years old or older. Of those 17 analysts, 6 were terminated, 4 resigned, and 7 survived the RIFs. In comparison, of the 14 analysts in the non-protected class, 4 were terminated, 2 resigned, 2 were transferred to the hedge fund, and 6 survived the RIFs. Also, of the 20 analysts evaluated, Steve Schroll, age 46, and Paul Stocking, age 41, both members of the protected class, ranked 1 st and 2nd, respectively, in the 2002 analyst rankings. In addition, the two analysts terminated with Wittenburg from the Technology Sector were both *younger* than she-Friedrichsen, age 41, and Lauber, age 36. Furthermore, Hollenhorst, who was the *same age* as Wittenburg in 2003 (age 51), was *not* terminated during the 2003 RIF.

Third, Wittenburg argues that Mahowald demonstrated age discrimination by rating Wittenburg a "maybe drop" during the June 2002 RIF, while ranking younger employees with lower scores in the "keep" category.[10] Wittenburg,

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10. Wittenburg labels these "younger" analysts as receiving lower scores than her scores. However, a close examination of the scores reveals their scores were comparable to or better than Wittenburg's scores. Three of the "younger" analysts-Tom Howell, Henry Kaczmarek, and Paul Stocking-all received higher "G" ratings than Wittenburg in 2001. The other two analysts-Laton Spahr and Mark Thompson-received the same "G" rating as Wittenburg in 2001. For 2000, Stocking received a higher "G" rating than Wittenburg, Howell and Kaczmarek received a lower "G" rating than Wittenburg, and Spahr and Thompson were not yet employed at AEFA. For 1999, Wittenburg did receive a higher score than Howell, Kaczmarek, and Stocking, but Spahr and Thompson were not yet employed at AEFA.

(Cont'd)

however, survived this first round of layoffs. In addition, of the three analysts selected for termination in the June 2002 RIF, only two of the three analysts were over 40 years of age. Furthermore, Wittenburg does not challenge AEFA's contention that these performance ratings were not used in the 2003 RIF.

Fourth, Wittenburg challenges AEFA's explanation for the RIFs, noting that Truscott stated that the RIFs were for cost-cutting, while AEFA represented to the district court that the RIFs were done to improve performance funds and *not* for cost-cutting. Truscott consistently testified, however, that the reason for the RIF was to redesign the EID, moving analysts positions from the Minneapolis office to the satellite offices. In addition, Truscott testified specifically about the 2003 RIF, stating that it was to employ the portfolio manager model and to reduce costs in the EID. A company need not provide evidence of financial distress to make an RIF

(Cont'd)

As for the other categories, Wittenburg ranked the same as Spahr, Thompson, and Howell, in the "independent research" category, while Kaczmarek and Stocking ranked higher than Wittenburg. In the "focus on key investment metrics" category, Wittenburg again ranked the same as Spahr, Thompson, and Howell, while Kaczmarek and Stocking ranked higher than Wittenburg. In the "opinions, convictions" category, Spahr, Thompson, Kaczmarek, and Stocking ranked higher than Wittenburg, while Howell ranked the same as Wittenburg. In the "all comm." category, Wittenburg ranked higher than Howell, Kaczmarek, and Stocking, and the same as Spahr and Thompson. In the "team player" category, Wittenburg ranked slightly higher than the five analysts. Finally, in the "visible" category, Wittenburg ranked higher than Thompson, Howell, Kaczmarek, and Stocking, while ranking the same as Spahr.

"legitimate." *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 956 (8th Cir.2001). Truscott never represented that cost reduction was *not* a consideration for the 2003 RIF. Rather, AEFA's counsel apparently made such a statement during argument to the district court where she stated that "cost cutting" was not a reason for the RIFs. However, arguments of counsel are not evidence. *See United States v. Mullins*, 446 F.3d 750, 760 (8th Cir.2006).[11]

Fifth, Wittenburg asserts that AEFA's reliance on her 2002 "G4/L3" rating to justify her termination is pretextual because (1) Mahowald conducted the performance evaluation knowing that there could be another RIF within the department in 2003 and that his performance ratings would determine which analysts would be eliminated; (2) Mahowald failed to present Wittenburg with a written review of her rating; (3) she received a high rating from Starmine based on the same performance data that AEFA used; (4) inaccuracies appear in the 2002 performance evaluation; (5) other similarly situated employees outside of her protected class received more favorable ratings; and (6) AEFA used a single year's performance evaluation to justify her termination.

Wittenburg relies on an email[12] that Dewald sent to

11. We also reject this challenge as it applies to Wittenburg's gender discrimination claim.

12. Dewald's email to Mahowald stated that "while Ted [Truscott] may be thinking longer-term Option 2, I don't think this should deter you from driving Option 1.2003/2004 is a long way off and if you can really make an impact with Central Research over time, Option 2 may become a mute [sic] point 18 months from now."

Mahowald in April 2002 to prove that Mahowald knew that another RIF could occur in 2003. However, the email does not establish that fact. Dewald said that "Option 2 may become a mute [sic] point 18 months from now," indicating a lack of certainty. Furthermore, after the June 2002 RIF, Mahowald sent an email to the EID stating that "[t]here is no second shoe to drop."

Regarding Mahowald's failure to present Wittenburg with a written review of her rating, *no analyst*-either within the protected class or outside the protected class-received written reviews in 2002. In addition, Mahowald met separately with each analyst to orally deliver his 2002 year-end performance reviews.

Wittenburg's high Starmine rating is also insufficient to prove pretext. Wittenburg admits that Mahowald did not have access to her 2002 Starmine rating when he gave her the G3 rating, which was changed at the ratings alignment meeting to a G4. In addition, Wittenburg admits that AEFA never used Starmine data for evaluating performance.

As to the inaccuracies in her 2002 performance evaluation, Wittenburg points to an error by the hedge fund managers stating that she had recommended the purchase of a certain stock for several months when, in fact, she had the stock rated neutral for nearly the entire year. Wittenburg, however, does not allege that Mahowald knew of this "erroneous assumption" when he analyzed the portfolio manager feedback, which indicated below average results for Wittenburg. Also, although Wittenburg argues that the "L" rating is subjective, "the presence of subjectivity in

employee evaluations is *itself* not a grounds for challenging those evaluations as discriminatory." *Hutson,* 63 F.3d at 780 (emphasis added). Instead, Wittenburg must present "affirmative evidence that [AEFA] manipulated the rating system" to discriminate against her on an impermissible basis. *Id.* Wittenburg attempts to meet this burden by arguing that she received an L3 rating despite being the only analyst to complete Mahowald's special project for 2002. However, Mahowald explained that although Wittenburg was the only analyst to complete the special project, her ratings on the stocks did not help portfolio managers make money and consequently was not a positive consideration in her rating. Mahowald also stated that her L3 rating was a direct result of the negative feedback portfolio managers gave Wittenburg.

Wittenburg next argues that Mahowald intentionally rated her lower in 2002 as a pretext for age discrimination. Wittenburg contends that similarly situated employees outside of her protected class were treated more favorably in terms of their L ratings. Specifically, she argues that Mahowald elevated the L ratings of Ramos, Lauber, and Steve Roorda by crediting them for completing a special "private placement" project that she was not assigned. Mahowald, however, explained that these analysts only received the special project because the private placements were "done in that analyst's area of expertise, [meaning that] they logically had extra work to do to research and recommend and otherwise monitor that investment." Furthermore, Wittenburg overlooks that, in 2002, Roorda, age 45, fell within the protected age group.

She also challenges her 2002 ratings based on AEFA's reliance only on the 2002 performance evaluations in deciding which analysts to terminate in the 2003 RIF. We have noted, however, that "[t]here is nothing inherently discriminatory in an employer choosing to rely on recent performance data more heavily than past performance in deciding which employees to terminate in a RIF," as this is a business judgment properly left to the employer's discretion. *Hutson*, 63 F.3d at 780. Truscott explained that AEFA measures analysts' performance in the "short run" because "many consumers look at one-year performance and make their decisions on this" and because "the track record at American Express had been so terrible that we needed to see how we were doing on a one-year basis."[13]

Finally, Wittenburg argues that pretext is also shown by conflict in AEFA's statements and its hiring actions. According to Wittenburg, AEFA claimed it needed only one Technology Sector analyst but then immediately assigned significant Technology-Sector stock coverage to Industrial Sector analysts Roorda, age 45, and Larry Alberts, age 49, and advertised for analysts to fill two vacancies two months after the 2003 RIF. However, "[e]mployers often distribute a discharged employee's duties to other employees performing related work for legitimate reasons." *Frieze*, 950 F.2d at 541. To prove that her termination was because of her age, a plaintiff needs to present evidence that her "discharge was part of a pattern of [the employer's]

13. We also reject Wittenburg's assertion that AEFA's reliance on her 2002 "G4/L3" rating to justify her termination is pretextual as it relates to her gender discrimination claim.

discharging employees over forty and distributing their work to younger employees." *Id.* Here, Wittenburg has presented no such evidence.

Furthermore, Roorda and Alberts are actually in the same protected class as Wittenburg. However, because "the ADEA prohibits discrimination on the basis of age and not class membership," we look to whether the replacement is "substantially younger" than the plaintiff. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). Therefore, we may not "rely on an arbitrary above 40/below 40 rule." *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1413 (8th Cir.1997) (holding that plaintiff's age discrimination claim failed where "[t]wo positions were filled by individuals older than or the same age as [the plaintiff]. Four positions were filled with individuals younger than [the plaintiff]. However, of these four positions, the largest age disparity between [the plaintiff] and the individual hired for the job was five years."). We conclude that Roorda and Alberts are not "substantially younger" than Wittenburg, as the largest disparity between Wittenburg and Roorda is six years.

As to AEFA advertising to fill two vacancies two months after the RIF, the two vacancies arose from among the ten *surviving* analyst positions. Therefore, AEFA did not create two new analyst positions after terminating Wittenburg. And, although Wittenburg argues that posting the new positions as "multiple sector" positions demonstrates pretext because AEFA had previously rejected "pooling" analysts, Wittenburg has failed to show that the postings were for a job

substantially similar to her Technology Analyst position.[14] Accordingly, we hold that Wittenburg has failed to prove pretext in her age discrimination claim.[15]

B. *Gender Discrimination*

Wittenburg next asserts that she presented sufficient evidence of gender-based animus and proved that AEFA's proffered reason for her termination was a pretext for gender discrimination.

First, Wittenburg points out that, at the time of her hiring, she was only one of two female analysts in a department of 26 analysts. The number of female versus male analysts is relevant; however, it alone is insufficient to show discriminatory animus.

Second, Wittenburg argues that she proved gender-based animus because of Mahowald's comment to Doremus that "you have to make concessions because a lot of these guys are the sole support of their families." Just as in *Frieze* where

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14. As to Wittenburg's gender discrimination claim, we also reject her argument that evidence of pretext can be found in AEFA's assigning Technology Sector stock coverage to two male Industrial Sector analysts and advertising for analysts to fill two vacancies shortly after the 2003 RIF. Regarding vacancies at AEFA after the 2003 RIF, AEFA actually hired Penny Kyle to fill the associate portfolio manager position.

15. Because the same analysis applies to MHRA claims as ADEA claims, Wittenburg's MHRA age discrimination claim also fails. *Ace Elec. Contractors, Inc. v. Int'l Bhd. of Elec. Workers, Local Union No. 292*, 414 F.3d 896, 900 (8th Cir.2005).

the president's comment was made four years before the employee was discharged and before the president was actually president, Mahowald made this comment four years before the 2003 RIF and before he was hired to run the EID. Therefore, Wittenburg has failed to show a causal relationship between Mahowald's 1999 comment and her termination in 2003.

Third, Wittenburg notes that Mahowald hired Blair Brumley, age 39, as an analyst weeks after the June 2002 RIF. Mahowald hired Brumley after two *males* were terminated in the 2002 RIF. Wittenburg contends that Mahowald told her that he was hiring Brumley because he had been unemployed for ten months and that Mahowald "also talked about Blair's [Brumley] family." Wittenburg argues that Mahowald's statement expressed his preference for "male breadwinners." Assuming that Mahowald's statement could be thus construed, Wittenburg's proof of gender discrimination in her termination is lacking.

Fourth, Wittenburg relies on a comment Mahowald made within hours of her termination in which he stated, "Your husband has a job, doesn't he?" In review of summary judgments we accord the nonmoving party all reasonable inferences. Inferring gender basis on this statement alone is not reasonable. In the absence of other proof, Mahowald's question does not show he terminated Wittenburg on the basis of her gender. Mahowald hired the second female analyst, Sandy Hollenhorst, in 2001 and AEFA retained Hollenhorst during the 2002 RIF.

Fifth, Wittenburg cites AEFA's retention of Ramos as the sole technology analyst who is, according to Wittenburg, a "historically lower performing male." Even if Wittenburg did "historically" perform better than Ramos, only the 2002 ratings were used in the 2003 RIF. Wittenburg does not dispute that Ramos's 2002 ratings were better than her ratings. In addition, Ramos was retained over two male technology analysts-Friedrichsen and Lauber.

Finally, Wittenburg points to evidence that AEFA distributed technology duties to two male employees who had little or no technology stock experience after her termination. As we previously noted, it is permissible for an employer, after an RIF, to distribute a terminated employee's duties to retained employees. Therefore, we hold that Wittenburg's gender discrimination claim also fails.[16]

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

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16. Because the same analysis applies to MHRA claims as Title VII claims, Wittenburg's MHRA gender discrimination claim also fails. *Kasper v. Federated Mut. Ins. Co.*, 425 F.3d 496, 502 (8th Cir.2005).

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA FILED SEPTEMBER 19, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

No. Civ. 04-922 (JNE/SRN)

Bonnie Wittenburg,

Plaintiff,

v.

American Express Financial Advisors, Inc.,

Defendant.

MEMORANDUM

Bonnie Wittenburg brought this action against her former employer, American Express Financial Advisors, Inc. (AEFA), asserting claims of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000), gender discrimination under Title VII of the Civil Rights Act (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (2000), and gender and age discrimination under the Minnesota Human Rights Act (MHRA), Minn.Stat. §§ 363A.01-.41 (2004). The case is before the Court on AEFA's motion for summary judgment.[1] For the reasons set forth below, the Court grants AEFA's motion.

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1. At the motion hearing, AEFA moved to strike certain exhibits prepared and submitted by Wittenburg. The Court declines to strike the exhibits at this time, but disregards those portions of the exhibits that are not properly supported.

Appendix B

I. BACKGROUND

AEFA provides financial planning advice, asset management, insurance, and annuities, primarily through a network of financial advisors. AEFA also manages mutual funds. In November 1998, AEFA hired Wittenburg at the age of forty-six. She was hired as an Equity Research Analyst in AEFA's Equity Investment Department (EID) and was assigned to cover stocks in the Technology Sector.[2]

In February 2002, Ted Truscott, AEFA's Chief Investment Officer, began to work on a redesign of the EID. The redesign involved the addition of three portfolio managers hired from a competitor, the creation of a new satellite office, and the merger or movement of certain funds to AEFA's satellite offices. The redesign also included the elimination of analyst positions in Minneapolis. AEFA used a "multiple incumbent process" to determine which analysts to terminate. As part of that process, AEFA ranked each analyst on a talent assessment chart. The rankings were based on several criteria including 1999-2001 performance ratings. The chart was used for a June 2002 reduction-in-force (RIF), in which Wittenburg was retained. In the June 2002 RIF, AEFA considered twenty-four analysts in the EID, fifteen were at least forty-years old and three were women. The RIF resulted in the termination of three analysts; all were men and two were more than forty.

During the summer of 2003, Truscott decided to restructure the Minneapolis office. The restructure allowed portfolio managers to supervise, hire, and recruit analysts to

2. Analysts were assigned to five sectors: Financial, Consumer, Industrial, Health Care, and Technology.

support the funds the portfolio managers oversaw and involved eliminating analysts by sector. AEFA's goal was to maintain sector coverage needed to support the remaining portfolio managers in Minneapolis. In November 2003, the EID was reorganized again, and AEFA decided to retain only one of the four Technology Sector analysts. AEFA again used the multiple incumbent process to determine who among the four analysts would be terminated. AEFA used 2002 performance ratings for the 2003 RIF. Of the four Technology Sector analysts considered for termination, only Dean Ramos (age 40) was retained; Wittenburg (age 51) and two male analysts (ages 41 and 36) were terminated.

On or about January 26, 2004, Wittenburg filed a charge with the Equal Employment Opportunity Commission and received her Notice of Right to Sue on January 30, 2004. She filed suit in this Court on February 13, 2004, alleging that AEFA discriminated and retaliated against her on the basis of her age and gender. AEFA now moves for summary judgment.

II. DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue

of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies its burden, Rule 56(e) requires the nonmoving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. Age and gender discrimination claims

1. Wittenburg's prima facie case

The parties agree that the *McDonnell Douglas* analysis applies to Wittenburg's ADEA, Title VII, and MHRA claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-04 (1973) (Title VII); *Chambers v. Metro. Prop. and Cas. Ins. Co.*, 351 F.3d 848, 855 (8th Cir.2003) (ADEA and MHRA). Under *McDonnell Douglas*, Wittenburg must establish a prima facie case of discrimination, at which point AEFA must come forward with a legitimate nondiscriminatory reason for its conduct. *See Chambers*, 351 F.3d at 855. In response, Wittenburg must then demonstrate that the nondiscriminatory reason offered by AEFA was a pretext for discrimination. *Id.*

Wittenburg alleges that AEFA discriminated against her on the basis of age and gender when it terminated her in 2003. This case is properly analyzed as a reduction-in-force (RIF) case. *See Fast v. S. Union Co.*, 149 F.3d 885, 890 (8th

Cir.1998) (noting sufficient personnel changes in department warrants analysis under RIF standard). To establish a prima facie case of age discrimination resulting from a RIF, Wittenburg must show that: (1) she is at least 40 years old; (2) she was qualified for the job; (3) she was discharged; and (4) age was a factor in AEFA's decision to terminate her. *Chambers*, 351 F.3d at 890. To establish a prima facie case of gender discrimination, Wittenburg must demonstrate that: (1) she is a member of a protected class; (2) she was qualified; (3) she was subjected to an adverse employment decision; and (4) some evidence of record supports the inference of gender discrimination. *See McDonnell Douglas*, 411 U.S. 802-04; *Kindred v. Northome/Indus. Sch. Dist. No. 363*, 154 F.3d 801, 803 (8th Cir.1998); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn.1986). Because this case involves a RIF, Wittenburg must make some additional showing that gender was a factor in her termination. *See Hesse v. Avis Rent A Car Sys., Inc.*, 394 F.3d 624, 631 (8th Cir.2005). The Court assumes without deciding that Wittenburg has established a prima facie case of age and gender discrimination.

2. Legitimate nondiscriminatory reason and pretext

AEFA presents legitimate nondiscriminatory reasons for selecting Wittenburg for termination. Namely, AEFA has proffered business and financial reasons for the 2003 RIF. Wittenburg, specifically, was terminated on the basis of a low 2002 performance rating. Therefore, the presumption of discrimination disappears and Wittenburg can avoid summary judgment only if the evidence considered in its entirety creates (1) a fact issue as to whether AEFA's proffered reasons

are pretextual *and* (2) a reasonable inference that age or gender was a determinative factor in AEFA's decision to terminate Wittenburg. *See Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 897 (8th Cir.2004); *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 807-08 (8th Cir.2003) (holding that the evidence did not create a reasonable inference of discrimination, despite the fact that plaintiff established a prima facie case and, perhaps, even demonstrated pretext). In short, Wittenburg must demonstrate that AEFA's proffered reasons are a pretext for illegal discrimination. *Kohrt*, 364 F.3d at 898.

Wittenburg asserts that AEFA treated younger male analysts more favorably than older and female employees. First, Wittenburg relies on the fact that AEFA hired Blair Brumley, a 39-year old male analyst, after two older male analysts were terminated in the 2002 RIF. This fact, however, does not demonstrate pretext or lead to a reasonable inference of discrimination. Wittenburg has proffered no evidence that AEFA's decision to hire Brumley was motivated by a discriminatory motive or that it was connected to Wittenburg's termination in 2003.

Second, Wittenburg claims that one can infer an improper motive because Dean Ramos (age 40) was retained during the 2003 RIF even though his 2003 performance ratings and tenure average were weaker than Wittenburg's. This evidence does not support an inference of discrimination because AEFA did not use analysts' 2003 ratings or tenure averages to determine terminations in 2003. Instead, there is no dispute that AEFA used analysts' 2002 ratings to determine who would be terminated in the 2003 RIF. Further, there is no

dispute that Ramos's 2002 ratings were better than Wittenburg's.

Third, Wittenburg argues that discrimination can be inferred because AEFA assigned two male analysts from another sector (ages 45 and 49) to work on technology stocks after Wittenburg was terminated and because AEFA posted job listings for "multi-sector" coverage after the 2003 RIF. The absorption of work by other analysts, however, does not create an inference of age or gender discrimination simply because the analysts were male and younger than Wittenburg. *See Frieze v. Boatmen's Bank of Belton,* 950 F.2d 538, 540-41 (8th Cir.1991). In the context of a RIF, employers often distribute work to other employees performing related work for legitimate reasons. *Id.* at 541. Moreover, the age differential between these two employees (ages 49 and 45) and Wittenburg (age 51) is insufficient to create a reasonable inference of age discrimination. *See Schiltz v. Burlington N. R.R.,* 115 F.3d 1407, 1412-13 (8th Cir.1997) (finding a five-year age disparity between plaintiff and individual hired after plaintiff's termination insufficient to raise an inference of discrimination at the prima facie stage). As to the "multi-sector" job posting, Wittenburg has made no showing that the job was the same as hers and therefore its posting does not support an inference of discrimination.

Fourth, Wittenburg argues that the talent assessment chart created in 2002 favored younger male analysts and set up older and female analysts for termination in the 2003 RIF. Specifically, Wittenburg contends that in 2002, AEFA decision-makers, including Mahowald, developed a talent assessment chart for analysts and that AEFA and Mahowald

knew in 2002 that the assessment would be used to determine terminations for the 2003 RIF. Wittenburg further asserts that Mahowald made negative comments about her performance that were inconsistent with her previous performance ratings and that she should have received a higher assessment. Wittenburg also asserts that older and female analysts that were placed low on the chart later received low 2002 performance ratings from Mahowald, which set them up for termination in 2003. After reviewing the record, the Court concludes that Wittenburg's allegations with respect to AEFA's motivation behind its talent assessment are unsubstantiated and speculative. The record is devoid of any support for Wittenburg's assertion that gender and age were motivating factors in AEFA's talent assessment chart. In addition, the record reveals that the talent assessment chart was used only for the 2002 RIF. There is no evidence connecting the chart to Wittenburg's termination in 2003. Therefore, evidence related to AEFA's use of the talent assessment chart does not permit a reasonable inference of discrimination. Nor does it support a finding of pretext.

Finally, Wittenburg argues that performance reviews were biased in favor of younger male analysts because they received undeserved 2002 performance ratings while she was not properly credited for her accomplishments. Although the record does show that Wittenburg believes she should have received higher 2002 scores and that some younger male analysts' evaluations were unwarranted, Wittenburg fails to put forth evidence that Mahowald or anyone at AEFA manipulated her ratings to set her up for termination because of gender or age. Instead, Wittenburg relies on her own speculative analysis of how AEFA should have rated its

employees and irrelevant evidence attesting to her qualifications as an analyst. For example, Wittenburg points to evidence that she performed well in 2003 and that Starmine, an independent financial industry service, rated her well. However, it is undisputed that AEFA used 2002 performance reviews for the 2003 RIF. There is no evidence that AEFA relied on Starmine to make 2003 RIF decisions. In addition, there is no evidence that AEFA chose to use the 2002 data to predetermine a biased outcome. *Cf. Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 959 (8th Cir.2001) (explaining that there is nothing inherently discriminatory about choosing to rely on recent performance more heavily than past performance). Therefore, Wittenburg's 2003 performance reviews and Starmine ratings are not relevant.[3] Wittenburg also asserts that Mahowald used subjective components in reviewing analysts' performance and inappropriately raised and lowered scores to the detriment of older workers. However, there is no evidence that Mahowald manipulated scores to achieve a biased outcome. Moreover, "the presence of subjectivity in employee evaluations is itself not a grounds for challenging those evaluations as discriminatory." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780 (8th Cir.1995).

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3. The Court will not examine the propriety of AEFA's decision to use 2002 performance reviews in the 2003 RIF. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780-81 (8th Cir.1995) (noting that discrimination laws do not give courts authority to act as super-personnel departments); *see also Regel v. K-Mart Corp.*, 190 F.3d 876, 880 (8th Cir.1999) (explaining that a company's exercise of its business judgment is not a proper subject for judicial oversight).

Appendix B

Wittenburg also relies on several comments made by AEFA employees. The Court assumes that these statements were made for purposes of this motion. *See* Fed.R.Civ.P. 56. The Court first turns to comments made before Wittenburg's termination in 2003. The first statement occurred sometime in 1999. Kay Doremus, a female analyst at AEFA, was placed on probation and sought advice from her colleague, Thomas Mahowald. During a conversation, Mahowald allegedly agreed with the proposition that AEFA tended to terminate one person per year and stated: "[Y]ou have to make concessions because a lot of these guys are the sole support for their families." This comment was made nearly four years before the 2003 RIF. Therefore, it lacks any temporal connection to Wittenburg's termination. More importantly, there is no evidence that this comment was in any way related to Wittenburg. Finally, there is no evidence that Mahowald, at the time, had any decision-making authority over Wittenburg or was making any decisions with respect to the hiring or firing of analysts. Indeed, Wittenburg asserts that Mahowald was hired to run the Equity Research Department in late 2001, and she has proffered no evidence that, in 1999, he was doing anything other than expressing his opinion as an analyst. The Eighth Circuit has ruled that at the pretext stage, "some causal relationship is necessary to demonstrate the significance of non-contemporaneous statements, or statements made by persons other than the relevant decision maker, to the resolution of the ultimate issue of intentional discrimination." *Hutson*, 63 F.3d at 779. Because Wittenburg has failed to proffer any facts demonstrating a causal relationship, the Court concludes that this comment cannot, as a matter of law, support a reasonable inference that Wittenburg was terminated because of her age or gender. *See id.*

Appendix B

The second comment occurred after the 2002 RIF, when Mahowald, then the head of the Equity Research Department, hired a 39-year old male, Brumley, as an analyst. Wittenburg contends that Mahowald told her that he was going to hire Brumley because he had been unemployed and that Mahowald "also talked about Blair's family." Wittenburg contends that this comment demonstrates that Brumley received favorable treatment because he was a man. Mahowald's comment, however, fails to demonstrate pretext or raise an inference of discrimination. Although this comment was made while Mahowald was the head of the Equity Research Department, this comment lacks any causal connection to Wittenburg's termination. In addition, to infer discriminatory motive from this statement requires the resort to speculation. *See Frieze,* 950 F.2d at 541 (noting that an inference is reasonable only if it can be drawn from the evidence without speculation). Even though Wittenburg argues that Mahowald, in speaking about Brumley's family, was expressing a preference for "male breadwinners," Wittenburg has not submitted evidence indicating exactly what Mahowald said about Brumley's family or that he expressed a preference for hiring men.

The third comment appeared in a 2002 news article about AEFA's hiring of several portfolio managers from Fidelity Investments. Truscott is quoted as saying: "We need to be as competitive as the best fund families out there. . . . We will hire talent where we feel we have gaps. That said, we are not adverse to hiring younger portfolio managers or analysts and growing them." This comment also fails to demonstrate pretext or to create a reasonable inference of discrimination. The comment was made after AEFA hired three portfolio

managers from another firm and explains that AEFA is willing to hire younger managers and analysts. No reasonable fact finder could conclude that this comment expresses a preference for young male analysts. Moreover, there is no indication that this comment was connected to Wittenburg's termination.

The fourth comment on which Wittenburg relies involves a hand-written note made in 2002 by Judith Forker, AEFA's Vice President Human Resources Relationship Leader. Forker wrote on a 2002 organization chart "maybe add a jr. person" next to the Finance Sector Team. Forker's handwritten comment is also insufficient to demonstrate pretext or to create an inference of discrimination. Again, there is no indication that this comment demonstrates a preference on the part of AEFA for younger, male analysts. Wittenburg has not proffered any evidence to explain what Forker meant by her notation. Moreover, there is no evidence that this notation, which was written next to the Finance Sector Team, was in any way related to the elimination of Wittenburg's position, which was in the Technology Sector.

The fifth comment was made by Dan Rivera in 2002. Wittenburg asserts that Rivera was the Head of Equities at that time. Rivera allegedly told Al Henderson, a 62-year old former portfolio manager, that he was terminated in the 2002 RIF as part of a decision to "retain those that were younger" because they had "more years of service ahead of them." While the record shows that Rivera was part of the redesign process of the EID in 2002, Wittenburg has not proffered evidence that he was a decision-maker with respect to the 2003 RIF. Moreover, Wittenburg has not presented evidence

that Rivera made any decision that negatively impacted her.[4] Accordingly, Rivera's comments do not demonstrate pretext or support an inference of discrimination. *See Hitt v. Harsco Corp.*, 356 F.3d 920, 925 (8th Cir.2004) (noting that remarks about age may establish pretext under some circumstances, but not when the remark was made by a non-decision-maker); *Frieze,* 950 F.2d at 541 (finding that ageist comments by persons who did not take part in decision to discharge plaintiff did not create a reasonable inference of discrimination). Even if Rivera's remarks are viewed as evidence of *his* motive to discharge Henderson, the remarks do not support an inference that AEFA's ultimate decision, which was not made by Rivera, to terminate Wittenburg was motivated by age. *See Hitt,* 356 F.3d at 925.

Wittenburg also relies on two comments made close to the time of her termination. First, Wittenburg argues that shortly after her termination Thomas Mahowald stated to her: "Your husband has a job doesn't he?" This statement, however, is too vague to establish pretext or to create a reasonable inference of discrimination. The Court acknowledges that Wittenburg is entitled to the benefit of all

4. The record reveals that Rivera, among others, was involved in the determination of how many analysts to retain in the 2002 RIF, but that he was not involved in a similar determination with respect to the 2003 RIF. In particular, Rivera was involved in the development of the 2002 talent assessment chart. Wittenburg has not, however, proffered evidence that this chart was used in the 2003 RIF. Nor did she proffer evidence that Rivera made any decisions that impacted her 2002 performance ratings, which were the basis for her termination. Indeed, Wittenburg asserts that Mahowald and Truscott were the actual decision-makers who allegedly manipulated and had the final say on her 2002 ratings.

reasonable inferences, but an inference is only reasonable if it can be drawn from the evidence without speculation. *See Frieze*, 950 F.2d at 541. No reasonable fact finder could conclude that this vague question demonstrates that Mahowald terminated her based on her gender or age.

Second, Wittenburg relies on comments made by Mike Kennedy, a portfolio manager, during a job interview after Wittenburg's termination. During the conversation, Wittenburg claims that Kennedy advised her that she should start looking for another job if he hired her, due to "the secrecy that had come to permeate AEFA under Truscott, and due to management's lack of respect for people." Kennedy also allegedly stated that two employees "did not want to retire now." Wittenburg believed that he meant older employees were unfavorably targeted. The Court concludes that Kennedy's comments cannot be interpreted as demonstrating discriminatory animus on the part of AEFA. Wittenburg's interpretation requires too great of an inferential leap. Kennedy's comments, on their face, appear to express a concern with a general lack of respect and secrecy, but nothing in his comments indicates bias against Wittenburg on the part of AEFA.[5]

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5. Wittenburg also asserts that discriminatory motive can be inferred because Kennedy ultimately hired a 39-year old male analyst. This inference is unreasonable. There is no evidence that Wittenburg was more qualified than the man hired and admits that during the interview she stated that she "wasn't necessarily comfortable with working with other people in the organization." Moreover, the position was initially offered to a woman, who did not accept.

Appendix B

Having addressed the comments made by AEFA employees, the Court turns to Wittenburg's remaining arguments on pretext. First, Wittenburg argues that AEFA failed to follow policy because Mahowald did not provide Wittenburg with a copy of her 2002 performance review and simply told her of the scores she would receive. There has been no showing that Mahowald's failure to give Wittenburg a written review would have had a material effect on her rating, which led to her termination. Moreover, there is no evidence in the record that Mahowald gave any other employee a written copy of a 2002 performance review.

Second, she argues that the committee at AEFA charged with ensuring that the rating process was non-discriminatory failed to do so by generally endorsing Mahowald's performance rating recommendations and engaging in discrimination itself. However, other than submitting evidence that the committee agreed with Mahowald's 2002 rating, Wittenburg has produced no evidence indicating discriminatory motive or bias.

Third, Wittenburg argues that AEFA's selection process was manipulated for a biased outcome. In support, Wittenburg argues that while AEFA claims that it used "current performance ratings" of individuals to determine whom to terminate during the 2003 RIF, it ignored performance data of 2003. Again, that AEFA used 2002 ratings to determine whom to terminate does not demonstrate bias. Indeed, the record indicates that only 2002 ratings were available at the time of the 2003 RIF and that all employees were evaluated based on these ratings. While it is clear that Wittenburg feels she would have fared better had AEFA used

different criteria in the RIF, there is no evidence that AEFA chose to use 2002 data to predetermine a biased outcome. *Cf. Evers*, 241 F.3d at 959.

Fourth, Wittenburg argues that AEFA categorized its analysts differently in the 2002 and 2003 RIFs, thereby allowing AEFA to terminate older and female analysts. Specifically, Wittenburg asserts that in its review for termination, AEFA categorized its analysts by "pool" in 2002 and "sector" in 2003 so it could bias the outcome of the RIF. AEFA argues that it had a business reason to analyze its analysts by sector for the 2003 RIF, namely because it had changed its research structure between 2002 and 2003. After a thorough review of the record, the Court is unable to find evidence supporting Wittenburg's claim. Instead, it appears that while Wittenburg is critical of the RIF process in general, AEFA's decision to categorize analysts by "sector" in 2003 does not demonstrate pretext or create a reasonable inference of discrimination.

Viewing the record in the light most favorable to Wittenburg, no reasonable fact finder could conclude that AEFA's proffered reasons for terminating Wittenburg are pretextual. In addition, the record does not permit a reasonable inference that age or gender actually motivated AEFA's decision to terminate Wittenburg. The Court therefore grants AEFA's motion for summary judgment insofar as it relates to Wittenburg's age and gender discrimination claims.

Appendix B

B. Retaliation

Wittenburg also argues that AEFA retaliated against her for filing a discrimination complaint by reducing the amount of her 2003 bonus. To establish a prima facie case of retaliation, Wittenburg must show: (1) a charge of discrimination was filed; (2) AEFA took adverse action; and (3) the adverse action was linked to the filing of the discrimination charge. *See Evans v. T.W. Servs., Inc. of Del.*, 930 F.2d 612, 614 (8th Cir.1991). If Wittenburg establishes her prima facie case, then AEFA must articulate a legitimate nondiscriminatory reason for its action. Wittenburg must then show that AEFA's proffered reason is pretextual and that her filing a discrimination charge was the real reason for AEFA's action. *See Jackson v. Delta Special Sch. Dist., No. 2,* 86 F.3d 1489, 1494 (8th Cir.1996).

Wittenburg argues that AEFA retaliated against her because it gave her a bonus that was less than the bonuses she received in previous years and less than the amount she claims she should have received. Wittenburg argues further that retaliatory intent, and therefore a causal connection, is demonstrated by the facts that AEFA did not initially agree to pay her a 2003 bonus, that AEFA labeled her bonus check "litigation settlement," and that AEFA allegedly gave her an undeserved low score on her 2003 review after it had learned of her legal claims. The Court assumes without deciding that Wittenburg can establish a prima facie case of retaliation.

AEFA has articulated a legitimate nondiscriminatory reason for the alleged adverse action. First, AEFA asserts that Wittenburg's bonus was determined in the same manner

as all other analysts and in accordance with its compensation plan. AEFA also contends that poor fund performance in 2002 and a change in the method of calculating bonuses in 2003 resulted in a smaller bonus pool in Minneapolis. AEFA asserts that many Minneapolis analysts received lower bonuses in 2003 as a result of the smaller bonus pool. Although Wittenburg questions the calculations used to determine, and the amount of, her bonus, she has not offered evidence demonstrating that AEFA's reasons are pretextual and that her bonus was lowered because she filed a discrimination charge. The Court therefore grants AEFA's motion for summary judgment insofar as it relates to Wittenburg's retaliation claims.

III. CONCLUSION

For the reasons stated above, the Court grants AEFA's motion for summary judgment. The Court will issue an Order consistent with this Memorandum separately.

Dated: September 19, 2005

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 16, 2006

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-4038

Bonnie Wittenburg,

Appellant,

v.

American Express Financial Advisors, Inc.,

Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Riley did not participate in the consideration or decision of this matter.

November 16, 2006

54 (3)

No. 06-1140

In The Supreme Court of the United States

BONNIE WITTENBURG,

Petitioner,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether review is necessary to reverse application of a standard by which an employment discrimination plaintiff must prove pretext by a preponderance of the evidence to withstand summary judgment, when that was not the standard applied in this case or by the Eighth Circuit in other cases?

2. Whether review is necessary to determine whether a discrimination plaintiff must show some causal connection between "stray remarks" and adverse action in order for those statements to constitute a submissible case of discrimination, when there is no genuine split among the circuits on this issue.

3. Whether review is necessary in this case to reverse the Court of Appeals decision that summary judgment on Petitioner's age and gender discrimination claims was appropriate, when Petitioner failed to present evidence to support a reasonable inference of pretext and such a ruling is consistent with this Court's directives on consideration of summary judgment?

4. Whether review is necessary to reverse application of a bright line rule that a six-year age difference between a plaintiff and a person to whom her duties are distributed after a reduction-in-force does not create an inference of discrimination, when no such bright line rule was applied in this case?

CORPORATE DISCLOSURE STATEMENT

Respondent American Express Financial Advisors, Inc. and its parent company, American Express, hereby submit this corporate disclosure statement, pursuant to 8th Cir. R. 26.1A: (1) As of September 30, 2005 American Express Company spun off Ameriprise Financial, Inc. (formerly known as American Express Financial Corporation), into an independent company. Ameriprise Financial, Inc. has no parent company as of that date; and (2) Berkshire Hathaway owns more than 10% of Ameriprise Financial, Inc. on the date of the spin-off.

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STATEMENT OF THE CASE

Petitioner Bonnie Wittenburg seeks review of a summary judgment decision by the district court, affirmed by the Eighth Circuit Court of Appeals, on Petitioner's claims of age and gender discrimination in connection with her termination as part of a reduction-in-force in November 2003.

Petitioner was hired by American Express Financial Advisors, Inc. (AEFA) in November 1998 when she was 46 years old, to work as an equity research analyst in AEFA's Equity Investment Department (EID). Petitioner was assigned to cover technology sector stocks, to do research and make a "buy, hold or sell" recommendation to AEFA Portfolio Managers.

In September 2001, Ted Truscott, 40, was hired as AEFA's Chief Investment Officer and became responsible for all investment activity at AEFA internationally. He directly supervised the senior EID Portfolio Managers, who supervised the analysts. In November 2001, Thomas Mahowald, 37, was hired as Director of Equity Research. Petitioner then reported to Mahowald, who reported to Truscott.

At the time that Truscott joined AEFA, the Company was facing declining investment results and an economic downturn compounded by the events of September 11, 2001. Truscott was charged with developing and implementing a world class asset management organization. At that time, the majority of AEFA's mutual funds were located and

managed in Minneapolis, with satellite offices in San Diego and New Jersey that were managed by Portfolio Managers. Research for the satellite offices was provided by Minneapolis analysts, including Petitioner. (Appendix of Appellee on Appeal to Eighth Circuit, pp. 558,565, 569, hereinafter "App. __")

In February 2002 Truscott began work on a redesign of the EID, with support from a large cross-functional team of AEFA employees. (App. 565-569, 584-585) As part of the redesign, Truscott decided to create another satellite office in Boston and to merge or move funds to the satellite offices in San Diego, Boston and New Jersey. (App. 565) The reorganization contemplated less use of Minneapolis research analysts to support the offices in Boston, San Diego, and New Jersey, and the addition of analysts in Boston and San Diego. (App. 559-561, 690) Consequently, there was a need to eliminate research analyst positions in Minneapolis through a reduction-in-force ("RIF"). (App. 565, 567, 589)

A February 2002 RIF related to the transfer of portfolios to the Boston office and involved only Portfolio Managers. In June 2002, there was another RIF in connection with the redesign which included three analyst positions but primarily impacted Portfolio Managers. AEFA's Human Resources Department conducted the 2002 RIFs using AEFA's standard multiple incumbent process, which included: 1) obtaining the business rationale from the business leaders; 2) obtaining organization charts; and 3) conducting the multiple incumbent ranking by comparing employees performing the

same function and ranking them according to a standard set of criteria, i.e., the previous year's performance rating, and if there was a tie, the next previous year's performance rating, and if still tied, tenure. (App. 583, 595, 648-651, 654-655, 659, 690-691) In the June 2002 RIF, out of a multiple incumbent pool of 24 analysts, 15 were 40 years old or older and three were women. Of the three analysts selected for job elimination, two were over 40 years old and none were women. (App. 684-688, 698-699) After the June 2002 RIF, Mahowald sent an email to the EID stating, "[t]here is no second shoe to drop," because he did not anticipate any further job eliminations as a result of the redesign. (App. 605, 608-609, 665, 667)

At the end of each year, all employees' performance was reviewed and rated for goal achievement (the "G" rating) and leadership competencies (the "L" rating), with 1 being the highest rating and 5 being the lowest. The year-end performance evaluation process for analysts was structured and consistent from year to year. The process began in September with the entry of performance data for each analyst into the Company's human resources system. That data included analysts' self-appraisals, which were submitted to Mahowald for his review and comments, and a preliminary performance rating determined by Mahowald based on the comments of Portfolio Managers, his own comments, and the information available to him at the time with respect to analysts' recommendations versus the "S&P 500" and the investment "universe." (App. 603) The performance data used to determine each analyst's

component G score was aggregated and reviewed at the year-end ratings alignment meeting, also known as the consistent ratings meeting, which occurred in December. (App. 629) The purpose of the ratings alignment meeting was to ensure that different leaders within the department were looking consistently at the performance of people in similar jobs. (App. 562-564, 579, 630-631, 633) Mahowald made a rating recommendation for each analyst. However, the ratings would sometimes change after the alignment meeting based on input from those attending. (App. 576, 580-581)

In late 2002, the EID held its ratings alignment meeting and Petitioner's 2002 performance rating, along with that of all other analysts, was reviewed by Truscott, Mahowald, Forker, Human Resources Relationship Leader Sherry Johnson, and Portfolio Managers Warren Spitz, Gordon Fines, Dan Rivera, John Schonberg and Jim Johnson. (App. 632, 636) Mahowald's proposed ratings were discussed by the group and were subject to change based on the group's discussion. (App. 616) In 2002 Mahowald's proposed rating for analyst David Benz, age 35, was G1/L3, but after the rating alignment meeting, Benz was rated G2/L3 for 2002. (App. 705) Similarly, for 2002, Mahowald's proposed rating for Petitioner was G3/L3, but as a result of the ratings alignment meeting, Petitioner's 2002 rating was lowered to G4/L3. Petitioner's performance, as with all analysts, was based primarily on an objective assessment of the performance of her stock picks and the funds on which she worked. (App. 601-603) Petitioner's low rating in 2002 was largely the result

of poor performance of the funds on which she worked and some correspondingly negative input from the Portfolio Managers she had worked with that year. (App. 576, 603-604) Although Petitioner, unlike some analysts, completed the assignment given by Mahowald to pick up unrated stocks in the fourth quarter of 2002, her ratings on those stocks did not help the Portfolio Managers make money and therefore was not a positive consideration in her rating. (App. 742) The other Technology Sector analysts' ratings in 2002 were: David Friedrichsen (age 39) G3/L3, Kurt Lauber (age 35) G3/L1, and Dean Ramos (age 39) G3/L1. (App. 707)

None of the analysts, including Petitioner, received written performance evaluations in 2002 because Mahowald did not have time to complete the portion of the written reviews relating to analyst stock picks. However, Mahowald met separately with each of the analysts including Petitioner, in February 2003, to deliver his 2002 year-end performance review verbally. Petitioner complained to Mahowald during this meeting that her 2002 rating was too low, but Mahowald disagreed. (App. 522, 554, 615) Again in June 2003, Petitioner complained about her 2002 rating to Mahowald. At that time, she asserted that her G4 rating was too low based on "Starmine" data for 2002. Starmine was an information system AEFA reviewed and considered using in 2003, but which was never used by AEFA in evaluation of analysts' performance. (App. 623) Mahowald agreed with Petitioner about what the "Starmine" data showed, but he disagreed that the data should have impacted her performance rating, since Starmine data was not used by AEFA

for evaluating any analyst's performance. (App. 554-555) In September 2003, Petitioner again raised the issue of her 2002 G4 rating because she heard that three analysts in Boston had been terminated for performance reasons, and because she wanted Mahowald to bias her 2003 rating so that she received a higher bonus for 2003. Mahowald reassured her that she was not on probation because of the G4 and that she should not worry about her rating because she was having a good year for 2003. (App. 554-555)

In the summer of 2003, AEFA decided to merge certain existing mutual funds into other funds and to transfer fund management of certain funds to other satellite offices. To implement this decision, Truscott decided to restructure the Minneapolis office to conform to the Portfolio Manager driven model in place in other satellite offices – a model that included having the Portfolio Manager hire and supervise the research analysts that supported the funds they managed. It was determined that the Minneapolis office would eliminate analysts by sector, so that the office would have the kind of sector coverage best needed to support the remaining Portfolio Managers in Minneapolis. (App. 565, 567, 570, 583, 589, 690-691)

In September 2003, Truscott informed Mahowald that there would be another RIF of analysts later in 2003. In October 2003, Mahowald, Forker, Chief Administrative Officer Peter Gallus, Sherry Johnson, Schonberg, Spitz, and Bales had meetings to determine how many analysts would be needed to cover each of the sectors of mutual fund

products located in Minneapolis. (App. 570-571, 591-592, 607-608) They determined that only one Technology Sector analyst was needed. At the time this business plan was implemented, Petitioner was one of four Technology Sector analysts. The business decision was made to retain only one of four Technology Sector analysts.

AEFA used its standard multiple incumbent process to determine which of the four Technology Sector analysts would be terminated. (App. 648-651, 654-655) Consistent with that process, the performance ratings of analysts for 2002 and, in the event of a tie, 2001, were used in determining which analysts within each sector would be terminated. Like all the other analysts, Petitioner's 2002 (G4/L3) and 2001 (G3/L3) ratings were used. (App. 587-588, 595-596, 690-691, 734-735; 738-740) The multiple incumbent process was applied to analysts by "sector" e.g., financial, consumer, industrial, health care and technology. (App. 589, 591-592, 596) Of the seventeen analysts, eleven were 40 years old or older and two were women. The two women analysts were Petitioner (age 51), and Sandy Hollenhorst (age 51), who had been hired by Mahowald in 2001. (App. 600) Of the seven analysts selected for job elimination based on application of the multiple incumbent process criteria, four were 40 years old or older and one (Petitioner) was a woman. (App. 684-691, 696-698) Of the four Technology Sector analysts who were considered for position elimination, Friedrichsen (age 41), Lauber (age 36), Ramos (age 40), and Petitioner (age 51), only Ramos was retained. (App. 684-691, 698-699)

Petitioner was notified of her position elimination on November 18, 2003 in a meeting with Truscott and Forker. Petitioner asked why she had been selected for position elimination and Truscott told her that the decision was made based on AEFA's desire to keep only one technology analyst and her low 2002 rating (App. 547-548, 554-555)

After the November 2003 RIF was announced, analysts Steve Roorda (age 45) and Larry Alberts (age 49), who covered the industrial sector, began to assist Ramos in covering the technology sector. (App. 525)

After she was laid off, Petitioner brought an action against AEFA asserting claims of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000), gender discrimination and retaliation under Title VII of the Civil Rights Act (Title VII), 42 U.S.C. §§ 2000e-2000e-17 (2000), and gender and age discrimination and retaliation under the Minnesota Human Rights Act, (MHRA), Minn. Stat. §§ 363A.01-.41 (2004). AEFA moved for summary judgment on all claims. The District Court applied this Court's and Eighth Circuit precedent in evaluating the motion, and granted summary judgment on all of Petitioner's claims and she appealed. The Eighth Circuit Court of Appeals faithfully applied the precedent of this Court and determined that Petitioner failed to present evidence from which a reasonable jury could find pretext, and affirmed summary judgment. This petition followed.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS BASED ON THE INCORRECT ASSERTION THAT THE COURT OF APPEALS APPLIED A "PREPONDERANCE OF THE EVIDENCE" STANDARD FOR EVALUATION OF PETITIONER'S PRETEXT CASE.

Petitioner rests her request for review primarily on the assertion that the Eighth Circuit demanded that she prove pretext by a preponderance of the evidence in order to survive summary judgment. However, the Court of Appeals did not embrace or impose a preponderance of the evidence standard in this case. Instead, the Court of Appeals reviewed the case under a standard that was wholly consistent with the holdings of this Court.

Petitioner relies on *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 897-98 (8th Cir. 2004), for her argument that the Eighth Circuit requires a plaintiff to prove pretext by a preponderance of the evidence to survive summary judgment. This case, of course, is not *Kohrt*. The Court of Appeals decision did not cite *Kohrt*. Moreover, while the *Kohrt* Court misstated the evidentiary standard on summary judgment, it did not *apply* the wrong standard.

Petitioner focuses exclusively one sentence in *Kohrt* that is surrounded on all sides by correct references to reasonable inferences, but that inexplicably failed to repeat that concept. In that

sentence, the Court misstated the plaintiff's burden by stating that "[s]tated in simpler terms, in order to survive summary judgment, Kohrt "must 'prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.*, *citing Hitt v. Harsco Corp.*, 356 F.3d 920, 924 (8th Cir. 2004) (*quoting Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 143 (2000)). But any impression that the *Kohrt* court actually *required* proof by a preponderance of the evidence at the summary judgment stage is dispelled two paragraphs later, when the court began its analysis of the summary judgment record. There, the Eighth Circuit stated that "[t]he district court held that Kohrt's ADEA claim did not survive summary judgment 'because the evidence [he presented did] not *create a reasonable inference* that age was a determinative factor in the decision not to rehire him.'[citation omitted] *We agree.*" *Kohrt* at 898 (emphasis added). When *Kohrt* is viewed as a whole, it becomes readily apparent that the Eighth Circuit applied a reasonable inference standard, and that the sentence Petitioner relies upon was simply an unintended misstatement.

This conclusion is supported by the fact that the only Eighth Circuit decision to cite *Kohrt* for the summary judgment standard did not cite the preponderance of evidence language and instead reiterated the "reasonable inference" standard for evaluating a plaintiff's burden of establishing pretext to avoid summary judgment. In *Johnson v. AT&T Corp.*, 422 F.3d 756 (8th Cir. 2005), the Court of Appeals relied on *Kohrt* in describing the showing

of pretext necessary to withstand summary judgment as "more than merely discrediting an employer's asserted reasoning" for adverse action; rather the plaintiff must "show that the circumstances permit a reasonable inference to be drawn that the real reason" was discrimination. *Id.* at 763. This is the standard routinely applied by the Eighth Circuit when reviewing summary judgment in discrimination cases, and is consistent with the holdings of this Court and that of the other Courts of Appeals. *See Crone v. United Parcel Service, Inc.*, 301 F.3d 942, 944 (8th Cir. 2002) ("Thus, the summary judgment issue in this case turns, as it often does in employment discrimination cases, on whether Ms. Crone presented evidence raising a reasonable inference that UPS's legitimate non-discriminatory reason was in fact a pretext for intentional sex discrimination;" "[plaintiff] failed to raise a submissible jury issue of pretext."), *citing Ryther v. KARE 11*, 108 F.3d 832, 848 & n. 13 (8th Cir. 1997) (en banc), *cert. denied*, 521 U.S. 1119 (1997) (this summary judgment standard is the same as for judgment as a matter of law); *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir. 2002) ("[plaintiff] may prove pretext and 'avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that [race] was a determinative factor in the adverse employment decision.'") *quoting Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996); *Erickson v. Farmland Industries, Inc.*, 271 F.3d 718, 726 (8th Cir. 2001) (to avoid summary judgment plaintiff must create an issue of material fact as to

pretext and create a reasonable inference of discrimination); *Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1044 (8th Cir. 2000) (same); *Taylor v. QHG of Springdale, Inc.*, 218 F.3d 898, 900-01 (8th Cir. 2000) (same).

In the instant case, the Court of Appeals did not use a preponderance of the evidence standard in evaluating Petitioner's pretext evidence. Instead, the Court of Appeals followed the standard articulated by this Court in the 1986 summary judgment standard trilogy when it reviewed all of the evidence and determined that a reasonable jury could not find that age or gender played a role in her termination. *Wittenburg v. American Express Financial Advisors, Inc.*, 464 F.3d 831, 836, 842 (8th Cir. 2006). As this Court held in *Celotex Corp. v. Catrett*, a defendant is entitled to summary judgment where a plaintiff has failed "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.". 477 U.S. 317, 322 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The plaintiff must produce sufficient evidence to allow a reasonable jury to return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This standard, properly applied, allows the Court to fulfill the legal mandate regarding summary judgment procedure, not as a disfavored procedural shortcut, but rather "as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive

determination of every action." *Celotex*, 477 U.S. at 327, citing Fed. R. Civ. P. 1.

In the instant case, the Court of Appeals reviewed Petitioner's evidence against the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Wittenburg*, 464 F.3d at 837. The Court of Appeals, as did the district court, assumed without deciding that Petitioner established a prima facie case of age and gender discrimination. *Id.* The Court noted the parties' agreement that AEFA proffered a legitimate non-discriminatory reason for Petitioner's termination in the November 2003 RIF. "Accordingly, our task is to determine whether a genuine issue of material fact remains whether AEFA's non-discriminatory reason was pretextual." *Id.* The Court of Appeals, as did the district court, then reviewed the evidence Petitioner presented in support of her argument that her termination was a pretext for discrimination, rejecting it as insufficient to support a reasonable inference of discrimination. *Id.* at 837-842. In doing so, the Court of Appeals applied the summary judgment analysis standard adopted by this Court and did not hold Petitioner to an incorrect standard of proof.

II. THERE IS NO CONFLICT IN THE COURTS OF APPEALS ON THE ISSUE OF WHEN STRAY REMARKS CONSTITUTE EVIDENCE OF DISCRIMINATION.

Petitioner tried and failed to manufacture an inference of discrimination from remote statements

attributed to her former co-workers. In attempting to cast this fact-bound issue as one requiring of this Court's intervention, Petitioner contrives a split between the circuits on the analysis of alleged discriminatory remarks as submissible evidence of pretext. Petitioner argues that there is a split among the circuits with regard to whether or not the alleged discriminatory remarks must have some causal connection to the adverse action. To the contrary, a clear and growing consensus among the circuits has emerged that - consistent with this Court's teaching in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) -- a causal connection must exist. Thus, even the shallow division of authority Petitioner alleges is illusory.

In *Reeves v. Sanderson Plumbing Products, Inc.*, this Court analyzed a claim that discriminatory remarks created an inference of discrimination. In reviewing a motion for summary judgment as a matter of law, this Court found that the plaintiff had introduced sufficient evidence that his termination decision was motivated by age based animus based on statements made by the actual decision-maker behind his hiring that he "was so old [he] must have come over on the Mayflower" and that he "was too damn old to do [his] job." *Id.* at 151. The Court found these statements were not stray remarks because the person who made the statements was the plaintiff's supervisor who had direct influence in the decision to terminate the plaintiff and because of other evidence of the supervisor's disparate treatment of the plaintiff and his co-worker who was 24 years younger. Noting all of these factors, including the substance of the statements and the

fact that they were made by a decision-maker in temporal proximity to the plaintiff's termination, the Court determined that the evidence was sufficient to create a reasonable inference of age aminous.

None of these factors were present in the instant case. The statements alleged to demonstrate discriminatory bias were vague and ambiguous and made discriminatory only by the speculative interpretation applied by the Petitioner. The statements were not temporally or causally related to her termination in the RIF, and there was no additional evidence of disparate treatment or other discriminatory conduct that would have supported a reasonable inference of age or gender animus.

The Court of Appeals' statement that a plaintiff must establish "some causal relationship" to show "the significance of [decisionmakers'] non-contemporaneous statements, or statements made by persons other than the relevant decision-maker, to the resolution of the ultimate issue of intentional discrimination" is consistent with this Court's precedent and that of the other Courts of Appeals. *Wittenburg*, 464 F.3d at 837, *citing Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995) (emphasis in original). In determining whether a statement creates an inference of discrimination, the Eighth Circuit considers factors such as (1) whether the statements were made by employees who took part in the decision or influenced the decision to terminate the plaintiff; (2) the time gap between when the statements were made and the date of termination; and (3) "whether the statement itself" is "an exhibition of

discriminatory animus" or merely an "opinion that such aminous might exist." *Id.*; *citing also, Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 542 (8th Cir. 1991) (holding that comments from the president of the company did not create a reasonable inference of discrimination because the president's comments to the employee that he had "waited too long . . . to start [his] effort towards becoming president of a bank and [the employee] would never make it" were made four years before the employee was discharged and before the president was actually the president).

Contrary to Petitioner's argument, the Third and Sixth Circuits also require some causal connection between a discriminatory statement and the employment decision. The Third Circuit, in *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 132 (3rd Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998), held that if the stray remark was made by an individual outside the employer's decision-making process, it may "constitute admissible evidence of managerial atmosphere and a possible discriminatory intent" only if certain factors were present. *Id.* at 133, *citing Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997). The *Ryder* Court cautioned about automatically assuming that any bigoted remark made by any corporate executive or other influential official should be deemed probative evidence of a discriminatory corporate culture. Rather, *Ryder* directed courts to weigh several factors in assessing the relevance of such remarks, including the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action. *Id.*

In *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344 (3d Cir. 1999), the Third Circuit found that discriminatory statements allegedly made by the company chairman that referred to women as less dependable than men were merely stray remarks which are "rarely given great weight, particularly if they were made temporally remote from the date of decision." *Id.* at 359. Though the chairman had the "final word" in hiring and firing, the Court reasoned that the statement was not probative of discrimination because it was not made in the context of any employment decisions involving the plaintiff. In addition, the Court noted that the remark did not reflect a generally discriminatory attitude at the company. *Id.* See also, *Windfelder v. The May Dep't Stores Co.*, 2004 WL362292 (3d Cir. February 26, 2004) (in affirming district court's grant of summary judgment in favor of the defendant, the Third Circuit held that comments directed to the plaintiff made two years prior to his termination, by a non-decision-maker, were "stray remarks" and not evidence of discriminatory animus; *Cerutti v. BASF Corporation*, 349 F.3d 1055 (7th Cir. 2003) (same).

The Sixth Circuit, in *Tooson v. Roadway Express, Inc.*, 47 Fed. Appx. 370, 375 (6th Cir. 2002), found no error in the district court's jury instruction that, unless the plaintiff has shown that the remarks were made by an employment decision-maker, "you are not to consider any stray remarks, comments, or characterizations in your deliberations." The court held that in order to be admissible evidence of discriminatory intent "the jury is required to find that the statement was that of a decisionmaker." *Id.*

The Sixth Circuit has also considered temporal proximity a relevant factor in the determination of stray remarks. In *Shefferly v. Alliance Health Plan of Mich.*, 2004 U.S. App. LEXIS 6829 (6th Cir. April 5, 2004), where plaintiff was told to "flirt and drink" more than a year before the alleged adverse employment action, the Court found this comment "too far removed in time to be probative of disparate treatment." *Id.* at *12.

The only other circuit alleged to reflect this split, the Eleventh, has similarly required that the remarks be related to an employment practice, or be made by a decisionmaker before they are considered probative of discrimination. In *Equal Employment Opportunity Commission v. Alton Packaging Corp.*, 901 F.2d 920, 924 (11th Cir. 1990), the Eleventh Circuit found that racial slurs made by the man responsible for promotion decisions were not "stray remarks" because "[he] was a decision-maker, and he made the remark in reference to hiring." *See also*, *Rojas v. Florida*, 285 F.3d 1339 (11th Cir. 2002) (employer's isolated sexist remark regarding a woman other than the plaintiff was insufficient on its own to establish pretext); *Scott v. Suncoast Beverage Sales*, 295 F.3d 1223 (11th Cir. 2002) (isolated racist comment made by supervisor and directed at plaintiff is insufficient on its own to establish pretext).

The decisions of the Third, Sixth and Eleventh Circuit are consistent with those of the other circuits, including the Eighth Circuit in that all consider the content and context of the statement, the timing the statement and who made the

statement in order to determine whether it is probative of discrimination. *Dunsmuir v. May Department Stores Co.*, 120 Fed. Appx. 927, 930 (3d Cir. 2005) (statement by nondecision-maker nine months prior to alleged adverse action was a stray remark insufficient to support a claim of retaliatory discharge); *Fetterman v. Napco, Inc.*, 2005 WL 1652212 at *2 (3d Cir. Jul. 14, 2005) (finding that stray remarks did not demonstrate pretext, as one remark did not pertain to age and the second remark was uttered seven months after plaintiff's discharge and was not probative of whether discharge was because of age discrimination); *Rowan v. Lockheed Martin Energy Systems, Inc.*, 360 F.3d 544, 549 (6th Cir. 2004) (stray comment made on the golf course by managers seven years before termination did not constitute direct evidence of discrimination); *Hitt v. Harsco Corp.*, 356 F.3d 920, 925 (8th Cir. 2004) (while stray remarks regarding age may be relevant to establishing a prima facie case or pretext under some circumstances, such comments are not persuasive evidence of motive when the remarks are made by persons other than the decision-maker).

At most, Petitioner has identified a conflict *within* a circuit, but not between the circuits. *Cf. Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) ("Discriminatory comments by non-decisionmakers, or statements temporally remote from the decision at issue may properly be used to build a circumstantial case of discrimination."), *Windfelder v. May Dep't Stores Co.*, 2004 WL 362292, at *3 (Comment made two years prior to plaintiff's termination "carries little weight" because it was made by a nondecisionmaker."); and *Foster v.*

Newcastle Area Sch. Dist., 2004 WL830878, at *3 (3d Cir. April 16, 2004) (School board members' remarks were "simply statements by nondecision-makers that are insufficient" to support a claim of discrimination.). But as this Court has noted, the proper solution for such intracircuit conflicts is en banc review and not certiorari. *Wisniewski v. U.S.*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties").

The Eighth Circuit applied this same analysis in analyzing and rejecting the alleged discriminatory remarks Petitioner asserted constituted probative evidence of age discrimination. *Wittenburg*, 464 F.3d at 837. The Court of Appeals determined that in addition to having no causal connection to Wittenburg's termination, Truscott's statement that the company was "not averse to hiring younger portfolio managers or analysts and growing them" did not evince a discriminatory policy or practice. Likewise, the Court of Appeals determined that there was no evidence that Forker's reference to maybe add a "junior person" in her notes made in connection with the 2002 talent assessment, had any causal connection to Wittenburg's termination or that it equated with a "younger person." Forker testified that "junior person" referred to band level, a company-specific designation of compensation (Appellant's Appendix on appeal to Eighth Circuit at A-256). Additionally, the Court rejected Petitioner's argument that Rivera's comment to another employee during an earlier RIF in which Petitioner was retained, was probative of discrimination in Petitioner's case because it was a non-

contemporaneous statement of a non-decision-maker.

Finally, the Court rejected Petitioner's argument that statements made by Mahowald created a reasonable inference of gender discrimination. The Court rejected Wittenburg's contention of discriminatory bias based on Mahowald's statement that he was hiring Brumley because he had been unemployed for ten months and that Mahowald "also talked about [Brumley's] family"; and Mahowald's statement after her termination that "your husband has a job, doesn't he" because they were too vague to suggest discriminatory bias. *Id.* at 841. Recognizing that on summary judgment the court must make all reasonable inferences in favor of the non-moving party, the Court determined that inferring gender bias from these statements was not reasonable.

Even if, however, Petitioner were not incorrect in her interpretation of the Court's analysis, this matter does not warrant this Court's review. Not every intracircuit difference in the articulation or application of a legal doctrine requires this Court's intervention. Here, it is a telling difference that none of the cases relied upon by the Plaintiff as proof of the supposed conflict actually state that such a conflict exists. That demonstrates the absence of a critical precondition to this Court's need to become involved – percolation of a recognized conflict, as judges debate whether to resolve the conflict by adjusting the standards themselves.

III. THE STANDARD USED BY THE COURT OF APPEALS IN EVALUATING PETITIONER'S EVIDENCE ON SUMMARY JUDGMENT IS NOT IN CONFLICT WITH THIS COURT OR WITH OTHER COURTS OF APPEALS.

Petitioner's argument that the lower court failed to review the "totality of the evidence" is an incorrect characterization of the Court's decision and an inadequate basis for granting the petition. What Petitioner characterizes as a failure to review all of the evidence and to view all inferences in her favor is nothing more than her disagreement with the Court's rejection of her evidence as failing to create an inference of discrimination. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme Court, Rule 10.

Petitioner argues that the Court of Appeals failed to review all of the evidence which she claimed supported a finding of pretext when it determined that there was not sufficient evidence from which a reasonable jury could determine that her termination was discriminatory. However, a review of the Court's decision demonstrates that the Court reviewed all of the evidence Petitioner claims was ignored. *Wittenburg*, 464 F.3d at 836-842. Petitioner objects to the Court's unwillingness to accept her inaccurate mischaracterization of the evidence. Petitioner's argument is essentially that in viewing all reasonable inferences in her favor, the Court was required to accept her mischaracterization of the

evidence. This is not an accurate statement of the Court's role on summary judgment.

For example, the Court reviewed Petitioner's argument that the results of the EID redesign was itself indicative of age discrimination because AEFA "got rid" of the eight oldest analysts in the department and gave four of the five oldest analysts low G4 or L4 ratings in 2002, thereby setting them up for termination in the 2003 RIF. *Wittenburg*, 464 F.3d at 837. The Court reviewed the evidence presented by Petitioner and determined that it did not support her assertion. "Wittenburg, however, ignores evidence that several members of the protected class survived the RIF. Out of 31 analysts affected by the 2002 and 2003 RIFs, 17 were 40 years old or older. Of those 17 analysts, 6 were terminated, 4 resigned, and 7 survived the RIF, in comparison, of the 14 analysts in the non-protected class, 4 were terminated, 2 resigned, 2 were transferred to the hedge fund, and 6 survived the RIFs. Also, of the 20 analysts evaluated Steve Schroll, age 46, and Paul Stocking, age 41, both members of the protected class, ranked 1st and 2nd respectively, in the 2002 analyst rankings. In addition, the two analysts terminated with Wittenburg from the Technology Sector were both *younger* than she – Friedrichsen, age 41 and Lauber, age 36. Furthermore, Hollenhorst, who was the *same age* as Wittenburg in 2003 (age 51) was *not* terminated during the 2003 RIF." *Wittenburg*, 464 F.3d at 837-838 (emphasis in original).

The Court of Appeals similarly reviewed the evidence presented by Petitioner in support of her

assertion that AEFA's reliance on her 2002 G4/L3 rating to justify her termination was pretextual, and rejected Petitioner's argument because the evidence did not support her assertion. For example, Petitioner argued that Mahowald conducted the performance evaluation knowing there could be another RIF in the department in 2003 and that his performance rating would determine which analysts would be eliminated. However, the only evidence of record directly refuted this assertion since Mahowald's email to the EID after the June 2, 2002 RIF stated "[t]here is no second shoe to drop." *Id.* at 839. Similarly, Petitioner argued that discriminatory bias in the review was demonstrated by the fact that Mahowald did not present her with a written review of her rating. However, the undisputed record showed that none of the analysts received a written review from Mahowald in 2002. *Id.*

The Court of Appeals also rejected Petitioner's assertion that a high rating from Starmine based on the same performance data that AEFA used was indicative of discriminatory bias in Mahowald's review because the undisputed record established that AEFA never used Starmine for evaluating performance. In addition, Petitioner admitted that Mahowald did not have access to her 2002 Starmine rating when he gave her the rating. Moreover, the undisputed evidence of record demonstrated that the G4 rating was based on other factors in addition to the stock performance data evaluated by Starmine. *Id.*

In sum, the Court of Appeals did not fail to look at the totality of the evidence. The Court looked

at the evidence Petitioner asserted demonstrated evidence of discriminatory bias and rejected it as not reasonably tending to do so. Neither did the Court of Appeals view Petitioner's termination in isolation, as Petitioner states. The Court considered undisputed evidence that Petitioner's termination was part of an overall RIF in connection with the redesign of AEFA's EID. Several other analysts were terminated in the RIF, and in other RIFs in connection with the redesign. The selection of those terminated was based on AEFA's multiple incumbent process, which was conducted by human resources professionals and not, as Petitioner suggests, by Mahowald, Truscott or Rivera. The only part Mahowald played in the identification of Petitioner for termination in the third RIF was his G4 performance rating of her for 2002. While Petitioner argues that the rating was unfair, viewing the evidence as a whole with all reasonable inferences in her favor, she was unable to produce evidence that it was discriminatory.

Petitioner argues that the Court viewed each piece of evidence in isolation and then wrongly concluded as to each piece of evidence that it "alone" did not establish discrimination. Petitioner's argument is essentially that insufficient evidence became sufficient by virtue of quantity, even though its quality did not meet the required legal standard. The Court of Appeals correctly rejected Petitioner's quantity over quality argument. The court reviewed all of her evidence of pretext, and determined that none of it created a reasonable inference of discrimination.

IV. THE PETITION IS BASED ON THE INCORRECT ASSERTION THAT THE COURT OF APPEALS HELD THAT AS A MATTER OF LAW THERE COULD BE NO INFERENCE OF AGE DISCRIMINATION BASED ON A SIX-YEAR AGE DIFFERENCE BETWEEN A TERMINATED PLAINTIFF AND A PERSON IN THE PROTECTED CLASS WHO ASSUMED HER DUTIES.

Petitioner argues that review of this case is necessary to correct the Court of Appeals' determination that a six year age difference between Petitioner and one of the two individuals to whom her duties were distributed after the RIF created an inference of age discrimination. Petitioner's argument is based on the incorrect assertion that the Court of Appeals determined that as a matter of law there could be no inference of age discrimination from the fact that a terminated plaintiff's duties were assumed by someone in the protected class who was six years younger. The Court of Appeals did not adopt or apply any such bright line rule in this case. Instead, the Court of Appeals engaged in precisely the analysis urged by Petitioner, by reviewing the totality of the circumstances and determining that there was no inference of age discrimination created by the fact that after the RIF, Petitioner's duties were distributed to two people in the protected class who were two and six years younger than her, respectively. *See Wittenburg*, 464 F.3d at 840 (adopting fact-specific analysis). This determination is consistent with *O'Connor v. Consol. Coin Caterers*

Corp., 517 U.S. 308, 313 (1996) and the other Courts of Appeals, which determine the significance of the age disparity with reference to the circumstances of the particular case. See *e.g.*, *Grosjean v. First Energy Corp.*, 349 F.3d 332 (6th Cir. 2003) (surveying the Courts of Appeals on the analysis of "substantially younger" from *O'Connor*).

Petitioner argues that the Court of Appeals erred in determining that there was no reasonable inference of discrimination from the fact that after she was laid off in the RIF, two employees that were younger than her took over some of her duties. One of the employees was 49 and the other 45. In *O'Connor*, this Court stated that "the ADEA prohibits discrimination on the basis of age and not class membership" and therefore directed the courts to look at whether the replacement employee was "substantially younger" than the plaintiff. *O'Connor*, 517 U.S. at 313. The Court of Appeals held that it "[could] not rely on an arbitrary above 40/below 40 rule," *Wittenburg*, 464 F.3d at 840, *quoting Schiltz v. Burlington N.R.R.*, 115 F.3d 1407, 1413 (8th Cir. 1997). The Court reviewed the circumstances of the replacement of Petitioner, including that it involved a RIF and one of the replacement employees was only two years younger than Petitioner. *Id.* The Court of Appeals did not, as Petitioner suggests, establish a rule that a six year age disparity was insufficient to establish a reasonable inference of discrimination. Instead, the Court determined that in this case, based on the undisputed facts of record, which included that the replacement of Petitioner was after a RIF by two employees in the protected class, one of whom was only two years younger than

she, there was no reasonable inference of discrimination. This analysis and holding is consistent with this Court's precedent and with that of other circuits. *See Grosjean*, 349 F.3d at 335-340.

In *Grosjean*, the Sixth Circuit Court of Appeals rejected the plaintiff's argument that because two employees who took over his duties after a RIF were three and six years younger than him, there was a reasonable inference of discrimination. The Court in *Grosjean* rejected the plaintiff's argument because the replacement occurred in the context of a RIF, the replacement employees had been doing jobs same or similar to the plaintiff prior to the RIF, and the largest age disparity between the plaintiff and the two replacement employees was six years. *Id.* at 336. *Grosjean* did not, as the Petitioner asserts, create a bright line rule that six years was not enough to establish a reasonable inference of age discrimination. Instead, the Court held that "[i]n the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an employee and a replacement employee is not significant." *Id.* Even if *Grosjean* could be read as creating a bright line rule, it is not appropriate to review that issue in this case when no such bright line rule was adopted by the Eighth Circuit Court of Appeals.

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No. 06-1140

IN THE

Supreme Court of the United States

BONNIE WITTENBURG,

Petitioner,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Across the nation, movants for summary judgment in employment discrimination cases cite this Court's 1986 trilogy[1] as boilerplate in their briefs. Often unread and poorly understood, the trilogy did not reverse or modify other cases such as *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). "Trial by deposition," like "[t]rial by affidavit," is "no substitute for trial by jury which so long has been the hallmark of 'even-handed justice.'" Justice White's opinion echoed this tenet in *Anderson*. A court should act "with caution" in granting summary judgment and should deny summary judgment "in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 255. Plus, the "judge's function is not himself to weigh the evidence and determine the truth of the matter, . . ." *Id.* at 249.

Even so, there were early warnings. Dissenting, Justice Brennan feared that telling a trial court not to weigh evidence at summary judgment but to consider its "quantum" and "caliber" would lead to a "a full-blown paper trial on the merits." *Id.* at 266-67. Justice Scalia, then a judge on the District of Columbia Circuit panel that heard *Anderson* before it reached the Supreme Court, cautioned against changing "the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts," that would "effectively force the plaintiff to try his entire case in pretrial affidavits and depositions." *Anderson v. Liberty Lobby, Inc.*, 746 F.2d 1563, 1570 (D.C. Cir. 1984).

Precisely that problem has come to pass in employment discrimination cases in the Eighth Circuit and other federal courts which is cause for alarm.[2] Civil rights, unlike

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1. *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

2. District courts in 2006 granted summary judgment in employment discrimination cases "[o]ver 70 percent" of the time. (Cont'd)

environmental protection and key aspects of antitrust, is not centered on government enforcement. Premised on private attorneys general asserting private rights of action, civil trials are its teeth. *Wittenburg* presents the major ways in which the system has gone awry. Rather than allay these concerns, the Respondent's Opposition Brief as addressed below has brought them into sharper focus.

I. Contrary to Respondent's Arguments, The Eighth Circuit Required Petitioner To Prove Pretext By A Preponderance Of the Evidence

Kohrt v. MidAmerican Energy Co., 364 F.3d 894, 897-98 (8th Cir. 2004), held that "in order to survive summary judgment, [plaintiff] must 'prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" Respondent claims that the Circuit did not actually *apply* that "unintended misstatement" as two paragraphs later it agreed with the district court "that Kohrt's ADEA claim did not survive judgment 'because the evidence [did] not *create a reasonable inference* that age was a determinative factor in the decision not rehire him.'" *See* Brf. in Opp. at 10. This argument fails because the quoted text does not address the proper evidentiary burden at summary judgment. Also, in the very next sentences, the Circuit restated its requirement that a plaintiff prove pretext in order to survive summary judgment:

> We hold that the district court properly granted summary judgment on the ADEA claim. The showing of pretext necessary to survive summary judgment "requires more than merely discrediting [MEC's] proffered reason for the adverse employment decision.

(Cont'd)

Joe Cecil and George Cort of the Federal Judicial Center, Memorandum to Hon. Baylson re: Estimates of Summary Judgment Activity in Fiscal Year 2006 (April 12, 2007). This study found "considerable variation across circuits and across districts within circuits." *See id.*

> [Kohrt] must also **prove** that the proffered reason was a pretext for age discrimination."

Kohrt, 364 F.3d at 898. *Kohrt* reflects the Circuit's confusion between the standards for summary judgment and a discrimination plaintiff's ultimate burden at trial.

The Circuit reiterated that a plaintiff must prove pretext by a preponderance in *Twymon v. Wells Fargo & Co.* 462 F.3d 925 (8th Cir. 2006), affirming summary judgment in a Title VII case. The Court of Appeals set forth the plaintiff's burden at the third step of the *McDonnell Douglas* burden-shifting framework: "Our consideration, then, is whether Twymon **proved by a preponderance of the evidence** that the stated reason for her termination was pretext." *Twymon*, 462 F.3d at 935. Respondent makes the novel argument that this Court should not take the Circuit at its words – even as they surface in progeny. *See e.g.*, *Wittenburg v. American Express Financial Advisors, Inc.*, No. 04-922, 2005 WL 3047785, *3 (D. Minn. Sept. 19, 2005) (citing *Kohrt*); *Yanda v. Mineta*, 2006 WL 1373155, *5 (D. Minn. May 15, 2006); *Murphy v. M.C. Lint, Inc.*, 440 F. Supp. 2d 990, 1014 (S.D. Iowa 2006) (quoting *Kohrt*); *McMannes v. United Rentals, Inc.*, 371 F. Supp. 2d 1019, 1031 (N.D. Iowa 2005) ("The showing of pretext necessary to survive summary judgment 'requires more than merely discrediting [United's] proffered reason for the adverse employment decision. [McMannes] must also **prove** that the proffered reason was a pretext for age discrimination.'"). Respondent likewise overlooks the Circuit's clear holding that Wittenburg had failed "to prove pretext" in her age and sex discrimination claims. *Wittenburg v. American Express Financial Advisors, Inc.*, 464 F.3d 831, 840-42 (8th Cir. 2006). The proof of pretext requirement undeniably equates to the impermissible preponderance of the evidence standard for summary judgment set forth in *Kohrt* and *Twymon*.

Respondent relies on the lone statement in *Wittenburg* that, "[a]ccordingly, our task is to determine whether a genuine issue of material fact remains whether AEFA's non-discriminatory

reason was pretextual." *See* Brf. in Opp. at 13. However, the Circuit affirmed not on account of Wittenburg's failure to raise a genuine issue of material fact relating to pretext, but because "Wittenburg ha[d] failed to prove pretext in her age discrimination claim." In addition, Respondent's reliance on that statement is flawed because the Circuit drew support from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973), whose proof paradigm describes the burdens required of plaintiffs at trial, not at summary judgment, which instead are addressed by the trilogy. The confusion between the burden at trial and at summary judgment is apparent and reflects the need for guidance by this Court.

II. Contrary To Respondent's Arguments, The Circuit Courts Differ On The Showing Necessary To Consider A Stray Remark As Relevant Evidence Of Discrimination

Respondent argues that all Circuit Courts require plaintiffs to establish a causal connection between a "stray remark" and the adverse employment action. *See* Brf. in Opp. at 13-14. In fact, the Circuits vary. *See generally*, Edward T. Ellis, *Evidentiary Issues in Employment Cases*, SK013 ALI-ABA 531 (2004) (stating that the Courts of Appeal "appear to differ on how connected a statement must be to the employment decision in order to avoid characterization of that statement as a stray remark"). The Eighth and Tenth Circuits compel plaintiffs to establish a causal connection between the discriminatory comment and the discharge in order for that comment to be considered evidence of discrimination. *See e.g.*, *Wittenburg*, 464 F.3d at 837; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000) ("plaintiff must demonstrate a nexus exists between the allegedly discriminatory statement and the company's termination decision, . . ."). The Second and Third Circuits assess "stray remarks" under normal relevancy standards pursuant to Fed. R. Evid. 401-402 and permit a reasonable inference of discrimination to arise without forcing plaintiffs first to show a specific causal connection to the adverse

employment action. *See e.g.*, *Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d 111, 115 (2d Cir. 2007); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995).

The Second Circuit recently addressed the issue at summary judgment. *Tomassi*, 478 F.3d at 115. A court must consider the discriminatory remarks in conjunction with "all" of the evidence in the record viewed in the light most favorable to the plaintiff. *Id.*, 478 F.3d at 115. Critically, a court must not first categorize remarks as "stray" or "not stray" and then simply disregard the former, as was done in the instant case. *Id.*, 478 F.3d at 116. While stating that "the more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination," the Second Circuit eschewed any requirement that a plaintiff first establish a causal connection between the remark and the discharge in order to consider the remark as evidence of discrimination. *Id.*, 478 F.3d at 115. The Circuit stated further that the relevance of remarks does not depend on their offensiveness, but "on their tendency to show that the decision-maker was motivated by assumptions or attitudes related to the protected class." *Tomassi*, 478 F.3d at 116. "Inoffensive remarks may strongly suggest that discrimination motivated a particular employment action." *Id.*[3]

Respondent's reliance on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), for a causal connection between the remark and the job action is misplaced. This Court found that the potentially damning nature of age-related remarks could not be discounted on the ground that they "were not made in the direct context of [the plaintiff's] termination." *Reeves*,

3. The Eighth Circuit dismissed Ted Truscott's statement (when AEFA was preparing to reduce employees) that it was willing to hire and grow "*younger* portfolio managers and analysts," as it was nothing more than "a generalized statement" that did not evince "a discriminatory policy or practice" or "establish that age was the basis for Wittenburg's termination." While the statement may not be offensive, it nevertheless suggests favoritism of younger employees going forward. *See Tomassi*, 478 F.3d at 116.

530 U.S. at 151-153. Far from requiring proof of a causal connection, *Reeves* taught that a court cannot disregard an employer's discriminatory statement merely because it was not directly related to the adverse action.[4] *See id.*

The Eighth and Tenth Circuits' causal requirement exceeds Fed. R. Evid. 401 and 402 by placing a heightened burden on plaintiffs first to establish a nexus between the remark and the discharge before it can be considered as evidence of discrimination. In this case,[5] the application of the causal requirement unjustly denied Petitioner the opportunity to proceed with circumstantial evidence of a discriminatory corporate atmosphere and decision-maker bias. *See* Pet. for Cert., pp. 17-23.

III. The Eighth Circuit Failed To Review The Record As A Whole

Respondent argues that the Circuit properly evaluated all of the evidence at the pretext stage. In support, it quotes at length from the Eighth Circuit's opinion. Brf. in Opp. at 23-25. However, the cited text highlights the Court's erroneous analysis of Petitioner's pretext evidence.

For example, in rebutting Petitioner's evidence that the eight oldest analysts were terminated or resigned, the Circuit found that "of the 20 analysts evaluated Steve Schroll, age 46, and Paul Stocking, age 41, both members of the protected class,

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4. Similarly misplaced is Respondent's assertion of an intracircuit split in the Third Circuit regarding "stray remarks." Brf. In Opp. at 19-20. Neither case cited by Respondent is precedential. *See Windfelder v. May Department Stores Co.* 93 Fed.Appx. 351, 2004 WL 362292 (3d Cir. 2004); *Foster v. New Castle Area School Dist.*, 98 Fed.Appx. 85, 2004 WL 830878 (3d Cir. 2004). As a result, neither is binding on the Third Circuit or any district court. Third Circuit IOP 5.3 & 5.7.

5. The Circuit also dismissed the statement made by Head of Equities, Dan Rivera, that management during the make-over terminated Al Henderson, 62, as "part of a decision to retain those that were younger as younger employees have more years of service ahead of them." *Wittenburg*, 464 F.3d at 833, 837.

ranked 1st and 2nd respectively, in the 2002 analyst rankings." *See* Brf. In Opp. at 23. This finding is **false**. While Schroll and Stocking's names happen to appear first and second in the ratings list, the two highest ranked employees (G1/L2) were Mark Thompson, 26, and Henry Kaczmarek, 39, both outside of the protected class. SA-32; A-21-23.[6] Rather than refuting Petitioner's evidence of prejudice, the rankings support her claim that AEFA was biased against older employees and favored younger ones.

The Circuit also discounted Petitioner's evidence that her supervisor, Tom Mahowald, was aware of a possible third RIF in the two-year makeover plan because he sent an e-mail in 2002 stating that "[t]here is no second shoe to drop." Brf. in Opp. at 23. A juror could disagree based on an e-mail to Mahowald from Human Resources several weeks earlier that informed him of the possibility of another RIF in 2003. SA-30. Viewing the evidence in the light most favorable to Petitioner, including that there *was* a RIF in 2003, Mahowald's "second shoe" comment could be seen as nothing more than a manager's false and temporary assurance to the workforce during a time of corporate upheaval.

The Circuit further discounted Petitioner's evidence that an evaluation company, Starmine, had rated her highly which called into question Mahowald's G/4 rating. Brf. in Opp. at 24. Petitioner submits that a jury would find it incredible that Respondent contracted for this service, received the analyst ratings for 2002, and now asserts that those scores are completely irrelevant and/or do not accurately reflect the analysts' performance.[7] Respondent claims that the "G4 rating was based

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6. Petitioner submits that this is the type of mistake that a jury, which places multiple sets of eyes on a document, is unlikely to make.

7. An equal and opposite inference is that the Starmine rating system constituted the employment equivalent of a "second set of books" that management willfully ignored in order to discharge Wittenburg – plainly a matter of intent. *See McGraw v. Comm. of Internal Revenue*, 384 F.3d 965 (8th Cir. 2004). In the discrimination arena, intent is a

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on other factors in addition to the stock performance data evaluated by Starmine." Brf. in Opp. at 24. The statement is contrary to Respondent's earlier one that "Petitioner's performance, as with all analysts, was based *primarily* on an objective assessment of the performance of her stock picks and the funds on which she worked." Brf. in Opp. at 4.

Due to its weighing and culling of facts, the opinion contains inaccuracies, credibility determinations, and evidence viewed in favor of the Respondent. *See supra*, and Pet. for Cert., pp. 23-28 (*e.g.*, Circuit found as fact that Mahowald rated Petitioner a "G/3" where a document clearly showed he rated her a lower "G/4").[8] Space does not permit a side by side comparison of the differing evidence presented by the Petition and Brief in Opposition, but the Circuit's piecemeal approach to facts enables a summary judgment court to choose between the competing stories of the parties, traditionally a jury function. *See Knox v. State of Indiana*, 93 F.3d 1327, 1335 (7th Cir. 1996). Likewise, isolating pieces of evidence at summary judgment prevents a jury from drawing inferences between and among them. For instance, the Circuit simply adopted the trial judge's finding that "junior" referred to "band" rather than age. However, if the

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(Cont'd)

"pure question of fact . . . [i]t is not a question of law, and not a mixed question of law and fact." *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982).

8. The Eighth Circuit's erroneous summary judgment analysis in employment discrimination cases is recognized even within its bench. *See e.g. Arraleh v. County of Ramsey*, 461 F.3d 967, 980-981 (8th Cir. 2006) (dissent, J. Heaney) (noting majority's erroneous failure to take into account the impact of multiple racially biased remarks in employee's failure-to-hire claim); *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606, 610 (8th Cir. 2006) (dissent, S. J. Donald Lay) ("Once again, our court is faced with an employment discrimination case where there are facts in dispute. Rather than submitting this conflict to a jury, the majority decides the facts as a matter of law. In my opinion, this is a violation of the Plaintiff's rights and the question of credibility should be submitted to a jury.").

use of "junior" is combined with the statements by Truscott and Rivera regarding management's desire to hire and retain younger workers over older ones, and the hiring of Blair Brumley, 39, during contemporaneous layoffs, the jury could draw the inference that "junior" indeed indicated the desire for younger employees – a desire that Respondent acted upon. The piecemeal method favors movants and denies plaintiffs the benefits of inferences from the totality of the evidence in derogation of Rule 56. *See Reeves*, 530 U.S. at 150-51.

IV. The Eighth Circuit Held That A Six Year Age Difference Between A Plaintiff And Her Replacement Is Not Sufficient To Permit An Inference Of Age Discrimination

Respondent maintains that the Eighth Circuit did not in fact hold that there could be no inference of age discrimination where the plaintiff's replacement is six years younger. Brf. in Opp. at 26. The argument is contrary to the Court's holding that Wittenburg could not show that her replacement was "substantially younger" since the "disparity between Wittenburg and Roorda is six years." *Wittenburg*, 464 F.3d at 840.[9] Respondent's stance again is contrary to the view of a district court. *Webb v. Potter*, 2007 WL 709016, *18 (W.D. Mo. Mar. 5, 2007), recently cited *Wittenburg* for the proposition that a "six-year age difference [is] not enough" to permit an inference of age discrimination. Petitioner believes that the subjective and arbitrary cut-off prevents the jury from weighing facts in context.

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9. The Circuit found that Wittenburg's duties were assumed by both Roorda (age 45) and Alberts (age 49), *see Wittenburg*, 464 F.3d at 840, when in fact they were assumed only by Roorda (age 45) and *Ramos* (age 40). A91. Alberts, while assigned certain technology related stock coverage, assumed the duties of Kurt Lauber and not Wittenburg. A89.

CONCLUSION

The "vanishing trial" is a matter of national concern especially in civil rights.[10] "[T]he data is incontrovertible that the American jury system is dying. It's dying faster on the federal side than on the state side; it's dying faster in civil cases than in criminal."[11] Employment discrimination leads this trend. *Wittenburg* demonstrates how courts become judges of the law and facts at summary judgment – now the main event in this area of litigation – even applying unsanctioned, arbitrary adjuncts to Rule 56 and evidentiary standards. The decisional law is increasingly uneven. In some circuits, Wittenburg would have had a strong case. In the Eighth Circuit, she did not even get a day in court. The injustice would have been palpable to the Founders who favored juries especially in cases involving the powerful.[12] Petitioner respectfully requests this Court to apply its clarifying authority in order to halt structural damage to the judiciary's vital role in the federal anti-discrimination system.

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10. *See* Seth Rosenthal, *The Jury Snub*, Slate, Dec. 18, 2006 (noting that the problem is "acute" in the Eighth Circuit).

11. Hon. William G Young, Address, 2004 Justice Roundtable, Civil Action Vol. 4, No. 1, page 4 (Spring 2005); Adam Liptak, *Cases Keep Flowing In, But the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007 (noting scholar Marc Galanter's view of a shift to "a more European way of decision-making by looking at the court file rather than through encounters with living witnesses whose testimony is tested by cross-examination").

12. *See* U.S. CONST. Amend. VII; THE DECLARATION OF INDEPENDENCE, ¶ 20 (U.S. 1776). John Adams inveighed against British enforcement of the Stamp Act in admiralty courts: "No juries have concern there! The law and the fact are both to be decided by the same judge." Leonard W. Levy, *Origins of the Bill of Rights*, 226 (Yale University 1999). Like Respondent, entities benefitting from cloistered paper contests in lieu of public trials often are economically powerful. Title VII requires "fifteen or more employees" and the ADEA requires "twenty or more employees." 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b).

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

BONNIE WITTENBURG,
Petitioner,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

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INTEREST OF *AMICI CURIAE*[1/]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 38 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, and various state laws, such as the Minnesota Human Rights Act, the statutes under which the causes of action at issue in this case arise. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

In this case, *Amici* are concerned primarily that the decision of the trial court, affirmed by the court below, improperly required the plaintiff to satisfy the preponderance of the evidence standard in order to avoid summary judgment. As a result of this decision, the ability of workers to vindicate their rights by trial has been severely undermined. *Amici* urge

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[1/] In compliance with Rule 37.6 of this Court, *Amici Curiae* AARP and NELA state that no counsel for any party authored this brief in whole or in part, and that no party or entity other than *Amici Curiae*, their members or counsel made a monetary contribution to the preparation or submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

the Court to grant the Petition so that it can reassert that the proper standard is that to defeat a motion for summary judgment, the plaintiff simply must show that there is a genuine issue of material fact, necessitating a trial. Unless this Court reverses the decision of the court below, employment discrimination plaintiffs like Ms. Wittenburg, whose cases almost always rely on circumstantial evidence, will find it nearly impossible to avoid summary judgment, leaving the playing field severely and unfairly tilted in favor of the alleged discriminators.

SUMMARY OF THE ARGUMENT

The affirmance by the Eighth Circuit of the grant of summary judgment for Respondent was erroneous because it was based on that court's confusing and legally incorrect articulation of the evidentiary standard that a plaintiff must satisfy to defeat a motion for summary judgment set forth in its earlier decision in *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894 (8th Cir. 2004), which was specifically relied on by the trial court. The decision below imposes an improperly high burden of proof on plaintiffs at the summary judgment stage of proceedings and should, therefore, be rejected by this Court. Under the proper standard, Ms. Wittenburg proffered sufficient evidence, including relevant ageist comments, to avoid summary judgment. Rather than evaluating that evidence as a whole, however, the court below considered it piecemeal and improperly rejected each individual item of evidence as insufficient to defeat summary judgment. Further, while this Court has concluded as a matter of law that the trier of fact is not permitted to draw an inference of age discrimination from the replacement of an older worker with one who is "insignificantly younger," given the closeness of the question of whether the age difference of six years in this case permits such an inference it is apparent that the court below failed to satisfy the requirements that it view the evidence in the light most favorable to the plaintiff and give plaintiff the benefit of all reasonable inferences.

I. THE COURT BELOW AFFIRMED SUMMARY JUDGMENT FOR DEFENDANT EVEN THOUGH THE TRIAL COURT'S DECISION WAS BASED ON AN IMPROPER STANDARD.

A. The *McDonnell Douglas* Burden-Shifting Proof Paradigm Did Not Change The Evidentiary Standard Applicable To Summary Judgment.

Rule 56 (c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted only if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court has pointed out that in response to a properly supported summary judgment motion this rule requires the nonmoving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a *genuine issue* for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This requirement, however, "do[es] not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Additionally, "the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968), quoted in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). In other words, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. In determining whether summary judgment is warranted, the "evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The parties and the court below agreed correctly that for the trial of an employment discrimination case, such as this one, where the plaintiff relies on circumstantial evidence, the three step burden-shifting indirect method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies. In *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), the Court described "the basic allocation of burdens and order of presentation of proof" prescribed by *McDonnell Douglas* in a discriminatory treatment case as follows:

> First the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving his prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-253. [Citations and internal quotations omitted].

In both *McDonnell Douglas* and *Burdine* the issues resolved by this Court arose in the context of a full bench trial, not on a motion for summary judgment. Thus, the proof paradigm prescribed in those cases describes the burdens required of the parties to prevail at trial, not their burdens at summary judgment, which are addressed by the Court's "summary judgment trilogy" of *Matsushita*, *Catrett*, and *Anderson* as described above. Indeed, in *Burdine*, the Court concluded that the burden placed on the plaintiff by the third

step of *McDonnell Douglas* "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," *Burdine*, 450 U.S. at 253, "now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256. Thus, the preponderance of the evidence standard generally required for plaintiffs to prevail at trial in other kinds of civil cases applies only to the plaintiff's "ultimate burden" under *McDonnell Douglas*.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), another intentional discrimination case arising from a "full bench trial," *id.* at 505, the issue involved, not the summary judgment standard, but standard of proof at trial, *i.e.*, "whether [under the *McDonnell Douglas* framework]... the trier of fact's rejection of the employer's asserted reasons for the [employer's challenged] actions mandates a finding for the plaintiff." *Id.* at 504. The Court held that, rather than *compelling* a finding for plaintiff, "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.* at 511.

Finally, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140 (2000), a case in which the Fifth Circuit had reversed a jury verdict for the plaintiff, this Court addressed the question "whether a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." (citation omitted). Clarifying its holding in *Hicks*, the Court in *Reeves* held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. The Court then cautioned, however, that "[t]his is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability." *Id.* Pointing out that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law [pursuant to FED.R.CIV.P.50],

such that the inquiry under each is the same," *id.* at 150 [internal quotations and citations omitted], the Court did not purport to change that standard, but addressed the question of "what evidence a court is to consider in ruling on a Rule 50 motion." *Id.* at 149. The Court concluded that:

> in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.

Id. at 150 [citations and internal quotations omitted].

Therefore,

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-49. Thus, *Reeves* clearly established that while the

plaintiff's ultimate burden at trial is to prove her case by the preponderance of the evidence, this standard is not applicable to either judgment as a matter of law or summary judgment.

Moreover, this Court in *Reeves* took great care to correct any misconceptions that may have arisen from *Hicks* by painstakingly explaining that the *McDonnell Douglas/Burdine/Hicks* proof scheme had not imposed a heightened proof standard for judgment as a matter of law [or summary judgment], *i.e.*, that while *McDonnell Douglas permits* a finding for plaintiff, such a finding is not *compelled*. The Court further explained that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases" from judgment as a matter of law. *Id.* at 148. To emphasize that its decision in *Reeves* had not altered this standard, this Court admonished "that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" *Id.*, quoting *Hicks*, 509 U.S. at 524.

Therefore, while the trial court must evaluate the evidence in accordance with the *McDonnell Douglas/Burdine/Hicks/Reeves* quartet of cases, the summary judgment standard established by the Court in the *Matsushita/Catrett/Anderson* trilogy remains unchanged. This conclusion is bolstered by the Court's language in *Anderson*, 477 U.S. at 252, stating thirteen years after *McDonnell Douglas* that on a motion for summary judgment, the trial judge's function is *not* to weigh the evidence and make credibility determinations to decide if the plaintiff has *proved* her case by a preponderance of the evidence, but to determine "whether reasonable jurors *could find* by a preponderance of the evidence that the plaintiff is entitled to a verdict - 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it." [emphasis supplied].

Indeed, in *Ryther v. KARE-11*, 108 F.3d 832, 838 (8th Cir. 1997) (*en banc*) the court concluded that after *Hicks*, "in all discrimination cases, the plaintiff must produce sufficient evidence of the elements of the prima facie case and where necessary, adduce sufficient proof of pretext to meet the *traditional tests* of summary judgment and judgment as a

matter of law." [emphasis supplied]. The decision below is, if anything, even more inexplicable because the *Ryther* holding is in complete agreement with *Hicks* and the subsequent guidance provided by this Court in *Reeves*.

B. The District Court Improperly Imposed The Preponderance Of The Evidence Standard At Summary Judgment.

In this case, the trial court, citing *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894 (8th Cir. 2004), granted summary judgment for defendant. Although Ms. Wittenburg argued on appeal that the trial court's reliance on *Kohrt* imposed an improperly high evidentiary standard at summary judgment, the Eighth Circuit failed to address the issue, simply holding that Ms. Wittenburg "failed to prove pretext in her age discrimination claim," *Wittenburg v. AEFA, Inc.*, 464 F.3d 831, 841 (2006), and that for lack of sufficient evidence her gender discrimination claim "also fails." *Id.* at 842. That decision, with its inherent reliance on the earlier *Kohrt* decision, however, misconstrues the standard of proof required of a plaintiff to avoid summary judgment. Because a plaintiff need not "prove pretext" to defeat a summary judgment motion, the decision misapplies the teaching of this Court in *Reeves*.

In *Kohrt*, a case in which the plaintiff sued his former employer alleging the he was fired because of his age in violation of the ADEA, the Eighth Circuit stated accurately that to avoid summary judgment, the plaintiff must present evidence that "(1) creates a question of material fact as to whether the defendant's proffered reasons are pretextual and (2) creates a reasonable inference that age was determinative factor in the adverse employment decision." *Id.* at 897. The very next sentence in *Kohrt*, however, unquestionably misstates the law. In that sentence, the court said: "Stated in simpler terms, in order to survive summary judgment, [plaintiff] 'must *prove by a preponderance of the evidence* that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.* [emphasis supplied], quoting its earlier decision in *Hitt v. Harsco Corp.*, 356 F.3d 920, 924 (8th Cir. 2004), which, in turn quoted *Reeves*, 530 U.S. at 143.

These two statements are irreconcilable because, as explained herein, the "preponderance of the evidence" standard applies to "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Burdine*, 450 U.S. at 253, quoted in *Reeves*, 530 U.S. at 143. It is unquestionably *not* applicable to summary judgment.

C. The Court Below Ignored The Trial Court's Reliance On The Improper Evidentiary Standard.

It is clear from the district court's rejection of Ms. Wittenburg's evidence as insufficient to avoid summary judgment that the conflicting statements of the law in *Kohrt* misled the district court to impose improperly on the plaintiff at summary judgment the preponderance of the evidence standard applicable to her "ultimate burden" under the burden-shifting proof scheme established in *McDonnell Douglas*. Nevertheless, the court below not only did not reverse the trial court, it did not even mention the issue. Instead, it stated that on *de novo* review its "task is to determine whether a genuine issue of material fact remains whether AEFA's non-discriminatory reason was pretextual," 464 F.3d at 836, without addressing whether pretext must be shown by a preponderance as required by *Kohrt*. Whether the court below intended to overrule *Kohrt sub silentio* or whether that incorrect decision remains applicable to all Eighth Circuit cases is unclear at best. What is clear is that the Eighth Circuit compounded the trial court's error by its piecemeal consideration and ultimate rejection of all of Ms. Wittenburg's evidence as insufficient to create a genuine issue of material fact and that whatever standard the court of appeals employed was misapplied. As clarified in *Reeves*, 530 U.S. at 148, the question at summary judgment[2/] is *not* whether the plaintiff proved pretext by a

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[2/] At issue in *Reeves* was the proper standard for judgment as a matter of law, but "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986)

preponderance of the evidence, but whether sufficient evidence was presented to create a genuine issue of material fact that would *permit* the trier of fact to make a finding of pretext. In fact, imposition of the preponderance of the evidence standard at summary judgment achieves the exact result that this Court stated its carefully crafted *Reeves* language was designed to prevent, *i.e.*, "effectively to insulate an entire category of employment discrimination cases from [summary judgment]." 530 U.S. at 148. In *Reeves*, of course, this Court's concern was that its holding in *Hicks*, should not be misinterpreted to compel summary judgment for plaintiffs. In this case, however, it is defendants rather than plaintiffs whom the decision below has inoculated against summary judgment by failing to reject *Kohrt*. Neither result is permissible under *Reeves*.

Additionally, the *Kohrt* requirement that the plaintiff must prove pretext by a preponderance of the evidence in order to survive summary judgment directly contradicts not only this Court's decision in *Reeves*, but also the Eighth Circuit's earlier holding in *Oldham v. West*, 47 F.3d 985 (8th Cir. 1995), a public sector Title VII[3/] retaliation case. In *Oldham*, although the trial court "correctly set forth the standard for summary judgment and the burden-shifting test used to establish retaliatory treatment" 47 F.3d at 988, it nevertheless granted summary judgment for the government because the plaintiff had failed to establish one element of his case, causation, by a preponderance of the evidence. *Id.* On appeal, the Eighth Circuit reversed, holding that "t]he fundamental error in the judge's analysis [was] that, on a motion for summary judgment, the plaintiff need not prove his case by a preponderance of the evidence, but merely need prove that a genuine issue exists as to one or more material facts." *Id.*

Other Circuits have reached the same conclusion. *See, e.g., Memberu v Allright Parking Systems, Inc.*, 93 Fed. Appx. 603, 606 (5th Cir. 2004) ("To survive summary judgment... the employee need only present sufficient evidence for a reasonable

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[3/] 42 U.S.C. § 2000e-5 *et seq.*

factfinder to infer discrimination.); *James v. New York Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000) ("[T]he standard for determining whether the evidence was sufficient to sustain the submission of the plaintiff's case to the jury was simply whether on the basis of that evidence, a factfinder could reasonably find the essential elements of a case of discrimination."); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) ("But the question at summary judgment is not which of the possible explanations is most convincing, it is whether the plaintiff has produced enough evidence to raise a genuine issue of material fact regarding *her* explanation."); *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 812-13 (9th Cir. 2004) ("When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.")

Reeves clarified that *Hicks* did not mandate a change in the summary judgment standard for employment discrimination cases. The court below erred by both failing to reject its earlier holding to the contrary in *Kohrt* and not being guided by its holding in *Oldham* that the preponderance of the evidence burden of proof does not apply to summary judgment. Thus, the confusing articulation of the summary judgment standard in *Kohrt* likely misled the district court here to require the plaintiff improperly to satisfy a higher evidentiary standard at summary judgment than this Court has permitted and one which the Eighth Circuit itself had emphatically rejected in *Oldham*. The Eighth Circuit's failure even to mention this issue is inexplicable. This Court should, therefore, grant the Petition to redress this fundamental error of law.

II. PLAINTIFF PRESENTED SUFFICIENT EVIDENCE TO SURVIVE SUMMARY JUDGMENT.

Ms. Wittenburg presented a large quantity and variety of evidence in her effort to avoid summary judgment. She submitted several ageist comments, including one by the Chief

Investment Officer, who the court found was "a decision-maker," 464 F.3d at 837, and one by "a decision-maker in the initial phase of the downsizing." *Id.* She also provided evidence of several incidents, which she argued showed that AEFA treated younger employees more favorably than older workers. This evidence was submitted to counter AEFA's proffered legitimate, non-discriminatory reason for Ms. Wittenburg's termination in the November 2003 RIF: her low 2002 performance rating. In *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 807 (8th Cir. 2003), the court below stated that once the defendant has met this burden of producing a legitimate, non-discriminatory reason for the challenged action, pursuant to the second step of the *McDonnell Douglas* proof paradigm,

> [t]he presumption of discrimination [that arises from the plaintiff's prima facie case] disappears and [plaintiff] "can avoid summary judgment only if the evidence considered *in its entirety* (1) creates a fact issue as to whether the employer's proffered reasons are pretextual *and* (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision."

(Quoting *Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996) (emphasis supplied); *see Kohrt*, 364 F.3d at 897 (same). Additionally, in evaluating the evidence to determine whether it satisfies this standard, the court must view it in the light most favorable to the plaintiff and must give the plaintiff the benefit of all reasonable inferences. *Mayer*, 318 F.3d at 806. Further, the court must be "mindful 'that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based.'" *Id.* quoting *Keathley v. Ameritech Corp.*, 187 F.3d 915, 919 (8th Cir. 1999). The court below failed in all three of these duties.

First, by considering each piece of evidence offered by Ms. Wittenburg individually, discounting that particular piece of evidence, and then moving on to consider and reject the next piece of evidence *seriatim*, the court below clearly did not step back and consider the evidence "in its entirety," as required by *Mayer*, *Rothmeier*, and *Kohrt*. Despite Ms. Wittenberg's extensive evidence, the court held that she "had failed to prove pretext in her age discrimination claim. 464 F.3d at 841. To the contrary, had this evidence been evaluated as a whole rather than piecemeal and under the proper standard, it should have been sufficient to avoid summary judgment.

Further, the court did not view the evidence in the light most favorable to the plaintiff. Rather, the court completely discounted Ms. Wittenburg's evidence, including the ageist comments of decision-makers. While each comment by itself may not have been sufficient to support an inference of discrimination and even though the comments were not made by the decisionmaker, nevertheless if evaluated together and viewed in the light most favorable to Ms. Wittenburg, those comments reflect that the decision to terminate her was made in "a corporate atmosphere unfavorable toward older employees," *Ryther*, 108 F.3d at 842, and along with her other evidence should have been sufficient to support an inference of age discrimination. *See Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3d Cir. 1997) (Ageist comments of unidentified senior executives made more than a year after the plaintiff was terminated (although totally unrelated to his termination) and which reflected a then-existing managerial attitude toward older workers or "corporate culture" "make the existence of an improper motive for [the plaintiff's] termination more probable.").

Other courts have rejected as inconsistent with the obligation to consider the evidence in its entirety the weighing of each individual item of evidence to determine if, by itself, it is sufficient to avoid summary judgment as the court below did here. For example, in *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994), the Seventh Circuit reversed the district court's grant of judgment as a matter of law for defendant after the jury had returned a verdict for the plaintiff. The court held that the

plaintiff had "presented a number of factors going beyond his own testimony" and that "[w]hile no one of these factors alone might sustain an age discrimination claim, their sum does permit a reasonable inference of age discrimination." *Id.* at 346. Similarly, in this case, Ms. Wittenburg does not rely merely on her own testimony, but has presented a "number of factors" that when considered together and viewed in the light most favorable to her permit a reasonable inference of age discrimination.

III. THE COURT BELOW ERRED IN HOLDING THAT AN AGE DIFFERENCE OF SIX YEARS BETWEEN MS. WITTENBURG AND ONE OF TWO EMPLOYEES TO WHOM HER WORK WAS DISTRIBUTED AFTER SHE WAS TERMINATED WAS INSUFFICIENT TO CREATE AN INFERENCE OF AGE DISCRIMINATION.

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996), this Court concluded as a matter of law that the trier of fact is not permitted to draw an inference of age discrimination from the replacement of an older worker with one who is "insignificantly younger." Although the Court said that the fact that a replacement is "substantially younger than the plaintiff" can be a "reliable indicator of age discrimination," *id.*, the Court did not establish a minimum age difference, which would preclude the factfinder from drawing the inference. In this case, the court rejected Ms. Wittenburg's argument that pretext can be inferred because AEFA assigned two younger male analysts from another sector to work on technology stocks after she was terminated. 464 F.3d at 840.

Relying on its decision in *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1412-147 (8th Cir. 1997), in which it held that an age difference of five years was insufficient to raise an inference of discrimination, the court concluded as a matter of law that the two replacements were not "substantially younger" than Ms. Wittenburg because the largest age disparity between Ms. Wittenburg and one of them was six years. 464 F.3d at 840. The court completely ignored its later decision in

Hammer v. Ashcroft, 383 F.2d 722, 726 (8th Cir. 2004), in which it "assume[d] ... that the six-year age difference ... was sufficient to support a prima facie case" of age discrimination because the question of whether a six year age difference is substantial "is a close one, and one that is not entirely free from doubt." *Id.* at n. 3.

Other courts have also rejected the establishment of a bright line rule regarding what age differential is sufficiently "substantial" to permit the factfinder to draw the inference of discrimination. For example, in *Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 996 (10th Cir. 2005), the Tenth Circuit concluded that even "a definitive five-year rule is unjustified. We are not convinced that all five-year age differences are the same." Given the acknowledgement in *Hammer* of the closeness of the question, it is apparent that the court failed to view the evidence in the light most favorable to the plaintiff and to give the plaintiff the benefit of all reasonable inferences. The question of whether the replacement was "substantially younger," properly resolved in plaintiff's favor, *does* permit an inference of discrimination.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

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Respectfully submitted,

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